DOCKET

No. 07-9712
Title: James Benjamin Puckett, Petitioner
v.
United States
Docketed: March 6, 2008
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (06-10543)
Decision Date: October 23, 2007
Rehearing Denied: December 4, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 3 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 7, 2008)
Apr 1 2008	Waiver of right of respondent United States to respond filed.
Apr 3 2008	DISTRIBUTED for Conference of April 18, 2008.
Apr 7 2008	Response Requested . (Due May 7, 2008)
Apr 23 2008	Order extending time to file response to petition to and including June 6, 2008.
May 30 2008	Order further extending time to file response to petition to and including July 7, 2008.
Jun 30 2008	Order further extending time to file response to petition to and including August 6, 2008.
Aug 1 2008	Brief of respondent United States filed.
Aug 11 2008	Reply of petitioner James Benjamin Puckett filed
Aug 14 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following question: Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure.
Oct 15 2008	Motion to appoint counsel filed by petitioner James Benjamin Puckett.
Oct 16 2008	Record received from U.S.D.C. for the Northern District of Texas. (1 box) This record contains sealed documents.
Oct 25 2008	Record received from the U.S.C.A. for the 5th Circuit. (1 envelope)
Oct 25 2008	Supplemental record received from the U.S.D.C.f or the Northern District of Texas. (1 envelope).
Oct 29 2008	Motion DISTRIBUTED for Conference of November 14, 2008.
Nov 7 2008	SET FOR ARGUMENT ON Wednesday, January 14, 2009.
Nov 17 2008	Motion to appoint counsel filed by petitioner GRANTED. Lars Robert Isaacson, Esquire, of Lewisville, Texas, is appointed to serve as counsel for the petitioner in this case.
Nov 17 2008	Joint appendix filed. (Jt. Appendix in two volumes.) Statement of costs received.
Nov 17 2008	Brief of petitioner James Benjamin Puckett filed.
Nov 24 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Nov 28 2008	CIRCULATED.
Dec 17 2008	Brief of respondent United States filed. (Distributed).
Jan 7 2009	Reply of petitioner James Benjamin Puckett filed. (Distributed)
Jan 14 2009	Argued. For petitioner: Lars R. Isaacson, Lewisville, Tex. (Appointed by this Court.) For

respondent: Lisa H. Schertler, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Feb 2 2009 Motion of the parties for leave to file Volume II of the joint appendix under seal filed.

Feb 4 2009 Motion DISTRIBUTED for Conference of February 20, 2009.

Name	Address	Phone
Attorneys for Petitioner:		
Lars Robert Isaacson Counsel of Record	401 East Corporate Drive Suite 100 Lewisville, TX 75057 larsisaacson@criminaldefender.info	(469) 948-4740
Party name: James Benjamin Puckett		
Attorneys for Respondent:		
Edwin S. Kneedler Counsel of Record	Acting Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: United States		
Lisa H. Schertler	Assistant to the Solicitor General Department of Justice Washington, DC 20530	
Party name: United States		
Other:		
Dahlia S. Fetouh	Goodwin Proctor LLP Exchange Place 53 State Street Boston, MA 02109	(617) 570-1000
Party name: National Association of Criminal Defense Lawyers		

PETITION FOR WRIT OF CERTIORARI

No. 08 _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LARS ROBERT ISAACSON **
TX State Bar No. 24042988
401 East Corporate Drive, Suite 100
Lewisville, Texas 75057
Phone: (469) 948 4740
Fax: (972) 346 6500

** Counsel of Record

QUESTION PRESENTED FOR REVIEW

I. Did the Fifth Circuit violate the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing?

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises that the Government failed to keep?

PARTIES

James Benjamin Puckett is the petitioner. The United States of America is the respondent.

TABLE OF CONTENTS

Table of Contents iv

Index to Appendices v

Table of Authorities vi

Opinion Below 2

Jurisdictional Statement 2

Constitutional and Statutory Provisions 2

Statement of the Case 4

Reasons for Granting the Writ 6

Argument

I. Did the Fifth Circuit violate the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing? 6

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises that the Government failed to keep?. . 12

Conclusion 15

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit

Appendix B Judgment of the Fifth Circuit denying rehearing en banc

TABLE OF AUTHORITIES

CASES

Case	Page
Bram v. United States, 168 U.S. 532 (1897)	11
Frame v. Hudspeth, 309 U.S. 632 (1940)	10
Herman v. Claudy, 350 U.S. 116 (1956)	10
In re Sealed Case, 356 F.3d 313 (D.C.Cir. 2004)	7
Johnson v. United States, 520 U.S. 461 (1997)	8
Kercheval v. United States, 274 U.S. 220 (1927)	10
Machibroda v. United States, 368 U.S. 487 (1962)	10, 11
Nguyen v. United States, 539 U.S. 69 (2003)	15
North Carolina v. Alford, 400 U.S. 25 (1970)	10
Powell v. Alabama, 287 U.S. 45 (1932)	10
Santobello v. New York, 404 U.S. 257 (1971)	9- 15
Shelton v. United States, 242 F.2d 101 (5th Cir.), rev'd en banc, 246 F.2d 571 (5th Cir. 1957), rev'd per curiam, 356 U.S. 26, 78 S. Ct. 563, 2 L. Ed. 2d 579 (1958)	10
Teeple v. United States, 15 Fed. Appx. 323 (Unpub. 6th Cir. 2001) (Clay, C.J., dissenting)	14
United States v. Barnes, 278 F.3d 644 (6th Cir. 2002)	7, 14
United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983)	9
United States v. Cohen, 60 F.3d 460 (8th Cir. 1995)	7
United States v. Courtois, 131 F.3d 937 (10th Cir. 1997)	8
United States v. Crusco, 536 F.2d 21 (3d Cir. 1976)	9
United States v. Gaines, 187 Fed.Appx. 658 (Unpub. 8th Cir. 2006)	7
United States v. Griffin, 510 F.3d 354, 360 (2nd Cir. 2007)	7
United States v. Ingraham, 238 Fed. Appx. 523 (Unpub- 11th Cir. 2007)	12
United States v. Hicks, 129 F.3d 376 (7th Cir. 1997)	7
United States v. Maldonado, 215 F.3d 1046 (9th Cir. 2000)	7
United States v. McQueen, 108 F.3d 64, (4th Cir. 1997)	6, 13
United States v. Miller, 565 F.2d 1273 (3d Cir. 1977) cert. denied, 436 U.S. 959, 57 L. Ed. 2d 1125, 98 S. Ct. 3076 (1978)	9
United States v. Mondragon, 228 F.3d 978 (9th Cir. 2000)	14
United States v. Moscahlaidis, 868 F.2d 1357 (10th Cir. 1989)	9
United States v. Munoz, 408 F.3d 222 (5th Cir. 2005)	6

United States v. Olano, 507 U.S. 725 (1993) 8,12
United States v. Puckett, 505 F.3d 377 (5th Cir. 2007) 2, 11-12
United States v. Rivera, 365 F.3d 213 (3rd Cir. 2004) 7
United States v. Rodriguez, 398 F.3d 1291 (11th Cir. 2005) 13
United States v. Romano, 314 F.3d 1279 (11th Cir. 2002) 7
United States v. Saling, 205 F.3d 764 (5th Cir. 2000) 14
United States v. Saxena, 229 F.3d 1 (1st Cir. 2000) 6
United States v. Taylor, 77 F.3d 368 (11th Cir. 1996) 14
United States v. Thayer, 204 F.3d 1352 (11th Cir. 2000) 8
Waley v. Johnston, 316 U.S. 101 (1942) 10
Walker v. Johnston, 312 U.S. 275 (1941) 10
White v. Maryland, 373 U.S. 59 (1963) 10
Williams v. Kaiser, 323 U.S. 471 (1945) 10

STATUTES

Statute	Page
18 U.S.C. § 2113(a) and (d)	4
18 U.S.C. § 924(c)(1)	4
28 U.S.C. § 1254(1).	2
Federal Rule of Criminal Procedure 52(b)	6

No. 08-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, James Benjamin Puckett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit opinion is captioned as United States of America v. James Benjamin Puckett, 505 F.3d 377 (5th Cir. 2007). A copy of the opinion is attached as Appendix A. A Motion for Rehearing En Banc was denied on December 4, 2007. A copy of that decision is attached as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on October 23, 2007. [Appendix A]. Defendant's Motion for Rehearing En Banc was denied on December 4, 2007 [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

Implicated in this case are the Fifth Amendment to the United States Constitution, which provides in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property without due process of law . . . .

and the Sixth Amendment to the United States Constitution, which provides:

> This case involves the Sixth Amendment rights to criminal defendants " to assistance of counsel: "In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

Also implicated is Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remainder of the statutory and regulatory provisions are set out in the appendices.

STATEMENT OF THE CASE

James Puckett was charged by indictment in the Northern District of Texas of violating 18 U.S.C. § 2113(a) and (d) (Bank Robbery) and 18 U.S.C. § 924(c)(1) (Firearm enhancement) for allegedly robbing a bank on April 4, 2002. Mr. Puckett was on post-conviction supervised release for three prior federal felony offenses[1] at the time of this alleged offense.

On September 3, 2003, Mr. Puckett pled guilty to both counts charged in this cause and executed a plea agreement and factual resume for these crimes that was accepted by United States District Judge Barefoot Sanders. Paragraph 8 of that agreement states: "The government has agreed that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." There were no conditions attached to this plea agreement.

On September 4, 2003, The Government filed its Motion to Decrease Offense Level Pursuant to USSG § 3E1.1(b), requesting that the Court to decrease defendant's offense level by one additional level. In that Motion, the Government alleged in support of this Motion that "the Government agrees that the defendant has clearly demonstrated acceptance of responsibility for his offense[.]" This Motion includes the language however, that the government "reserved the right to withdraw this motion in

[1] *See United States v. Puckett*, 3:97-CR-093-H-01 ; *United States v. Puckett*, 3:97-CR-175-H-01; and

the event that the defendant engages in conduct inconsistent with his acceptance of responsibility."

At sentencing however, the Government stated: "Your honor, to the acceptance of responsibility, that third level, which, of course, does not come into play unless the court finds that he should receive the downward - - the first two levels, that was made a long time ago. That was before the offense that was committed that Ms. [HARBGS/] included in her presentence report and we would object to him receiving *any acceptance or responsibility points at this point.*" Defendant did not object to the Government's breach of the plea agreement, but objected on other grounds. Judge Sanders did not grant Defendant the three acceptance points in imposing sentence.

On appeal, Defendant raised the following issues: (1) whether the district court erred in denying Defendant's request to withdraw his guilty plea; (2) whether the Government breached the plea agreement, thus entitling Defendant to withdraw his guilty plea (3); whether the district court erred in denying Defendant acceptance points for allegedly taking part in a new criminal venture while incarcerated for this cause; and (4) whether the district erred in denying Defendant's Motion for Ineffective Assistance of counsel.

United States v. Prewitt, 397 CR 176 11-01.

In response, the Government admitted that it breached the plea agreement at sentencing: "The government does not dispute that the prosecutor's objection at sentencing to Puckett receiving a reduction for acceptance of responsibility was contrary to the government's obligation as stated in the Plea Agreement." Appellee's Brief to the Fifth Circuit at 21. Despite this admission, the Fifth Circuit denied all of the Defendant's arguments on appeal and affirmed. Defendant petitioned for a rehearing en banc that was denied.

REASON FOR GRANTING THE WRIT

I. The Fifth Circuit violated Santobello when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing.

Federal Rule of Criminal Procedure 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The First[2], Fourth[3], Fifth[4], Sixth[5], Seventh[6], Eighth[7], Ninth[8],

---

[2] See United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000)("When a defendant has knowledge of conduct ostensibly amounting to a breach of a plea agreement, yet does not bring that breach to the attention of the sentencing court, we review only for plain error").

[3] See United States v. McQueen, 108 F.3d 64, 65-66 (4th Circuit 1997)("McQueen asserts that the Government's failure to argue the plea agreement terms to the sentencing court amounted to a breach of the plea agreement. . . . Because McQueen raises this issue for the first time on appeal, however, we must affirm the sentence imposed by the district court unless we find plain error").

[4] See United States v. Munoz, 408 F.3d 222, 226 (5th Cir. 2005)("Because Munoz did not object [to the breach of the plea agreement] at sentencing, the court reviews the argument for plain error").

Eleventh[9] and the D.C. Circuit[10] apply some form of a "plain error" standard where a Defendant failed to object at sentencing to the Government's breach of a plea agreement, then sought to raise it on direct appeal. The Second[11], Third[12] and Tenth[13]

---

[5] See United States v. Barnes, 278 F.3d 644; 646 (6th Cir. 2002)("We review the question of whether the government's conduct, or lack thereof, violated its plea agreement with a defendant de novo. . . . However, because Defendant failed to object after the government did not offer a recommendation at sentencing, Defendant waived his right to appeal any breach of the plea agreement, and a plain error analysis thus guides this Court's review")(citation omitted).

[6] See United States v. Hicks, 129 F.3d 376, 378 (7th Cir. 1997)("A defendant's failure to allege the breach of a plea agreement at sentencing waives the matter for appeal. . . . We will, however, reverse even on a relinquished ground if the district court committed plain error").

[7] The Eighth Circuit holds that a Defendant's failure to object at sentencing to the Government's breach of a plea agreement waives this issue. See United States v. Cohen, 60 F.3d 460, 462 (8th Cir. 1995). However, a "plain error" standard has also been applied in unpublished decisions. See United States v. Gaines, 187 Fed.Appx. 658 (8th Cir. 2006)(When Defendant failed to object to the Government's breach of the plea agreement at sentencing, "[e]ven assuming there was no waiver, the matter of an alleged breach was not properly preserved, and we would review the claim only for plain error").

[8] See United States v. Maldonado, 215 F.3d 1046, 1051 (9th Cir. 2000)("Because Maldonado waived the breach of plea agreement issue, we review his claim for plain error").

[9] See United States v. Romano, 314 F.3d 1279, 1281 (11th Cir. 2002)("[T]he Government notes that appellant failed to raise [the issue of the Government's breach of the plea agreement] before the district court. The Government is right; hence, we review appellant's contention for plain error").

[10] See In re Sealed Case, 356 F.3d 313, 316-317 (D.C.Cir. 2004)("[W]e join the substantial majority of circuits holding that when a defendant raises a claim of breached plea bargain for the first time on appeal, the reviewing court should apply a plain error standard of review consistent with Fed. R. Crim. P. 52(b)").

[11] See United States v. Griffin, 510 F.3d 354, 360 (2nd Cir. 2007)(citations omitted). The Second Circuit applies a "de novo" review in situations where the Defendant does not object to breaches of the plea agreement at sentencing, noting "Because the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant."... Where plea agreements are involved, the government must take particular "care in fulfilling its responsibilities." Id.

[12] See United States v. Rivera, 365 F.3d 213 (3rd Cir. 2004)(Breach of plea agreement even if not raised at sentencing subject to "de novo" review, rejecting "plain error" standard articulated in Rule 52(b)).

apply a "de novo" review, regardless of whether the Defendant objected at sentencing to the breach. The conflict among the Circuits is real, and raises significant practical issues for Defendants who seek to challenge a prosecutor's breach on appeal after failing to raise this issue at sentencing.

The "plain error" standard is defined as: "[B]efore an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affects substantial rights." . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error ""seriously affects the fairness, integrity, or public reputation of judicial proceedings."" Johnson v. United States, 520 U.S. 461, 467 (1997), citing United States v. Olano, 507 U.S. 725,732 (1993)(further citations omitted). "The plain error standard is very high, requiring that the error affect a substantial right of the defendant. . . . "A court of appeals may correct a plain, forfeited error affecting substantial rights 'only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000)(citations omitted).

---

[5] See United States v. Courtois, 131 F.3d 937, 938, n.2 (10th Cir. 1997)("Because the failure to object to an alleged plea agreement does not waive the issue, we may review the defendant's claim de novo rather than for plain error").

Conversely, under a "de novo" standard, the Court stands in the shoes of the trial court- if a breach occurred, then these courts have held that a remand to the trial court for either sentencing or a withdrawal of the plea is necessary. This evaluation is set out clearly in United States v. Moscahlaidis, 868 F.2d 1357, 1360 (10th Cir. 1989):

> The facts of the case, if disputed, are determined by the district court and our review of those findings is limited to a clearly erroneous standard. *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983). Whether the government's conduct violates the terms of the plea agreement is a question of law and our review is plenary. *United States v. Miller*, 565 F.2d 1273 (3d Cir. 1977), *cert. denied*, 436 U.S. 959, 57 L. Ed. 2d 1125, 98 S. Ct. 3076 (1978); *United States v. Cruseo*, 536 F.2d 21 (3d Cir. 1976). As to the third question, the Supreme Court, in *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), concluded that once the court finds a breach of the plea agreement by the government the case must be remanded for either resentencing or withdrawal of appellant's guilty plea. Under these standards, we review this case.

In the seminal case of Santobello v. New York, 404 U.S. 257 (1972), the Defendant attempted to withdraw his guilty plea when the prosecutor reneged on an earlier promise to make no recommendation as to the sentence to be imposed by the Judge. In overturning the conviction, the United States Supreme Court held directly: "[A] constant factor is that when a plea agreement rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262.

The underpinnings for this holding are rooted in the United States Constitution, including the Sixth and Fourteenth Amendments. See Santobello at 265 (concurrence of Douglas, J.)("Although Kercheval's dictum concerning grounds for withdrawal of guilty pleas did not expressly rest on constitutional grounds (cf. Frame v. Hudspeth, 309 U.S. 632), Walker v. Johnston, 312 U.S. 275, clearly held that a federal prisoner who had pleaded guilty despite his ignorance of and his being uninformed of his right to a lawyer was deprived of that Sixth Amendment right, or if he had been tricked by the prosecutor through misrepresentations into pleading guilty then his due process rights were offended").

Justice Douglas continued, noting that "[s]tate convictions founded on coerced or unfairly induced please have also received increased scrutiny as more fundamental rights have been applied to the States."[14] Id. at 265-66. More specifically, Justice Douglas noted "But it is also clear that a prosecutor's promise may deprive a guilty

---

[14] See See Santobello at 265-66 (concurrence of Douglas, J.)("After Powell v. Alabama, 287 U.S. 45, the Court held that a state defendant was entitled to a lawyer's assistance in choosing whether to plead guilty. Williams v. Kaiser, 323 U.S. 471. In Herman v. Claudy, 350 U.S. 116, federal habeas corpus was held to lie where a lawyerless and uneducated state prisoner had pleaded guilty to numerous and complex robbery charges. And, a guilty plea obtained without the advice of counsel may not be admitted at a subsequent state prosecution. White v. Maryland, 373 U.S. 59. Thus, while plea bargaining is not per se unconstitutional, North Carolina v. Alford, 400 U.S. 25, 37-38, Shelton v. United States, 242 F.2d 101., aff'd en banc, 246 F.2d 571 (CA5 1957), a guilty plea is rendered voidable by threatening physical harm, Waley v. Johnston, supra, threatening to use false testimony, ibid., threatening to bring additional prosecutions, Machibroda v. United States, supra, or by failing to inform a defendant of his right of counsel, Walker v. Johnston, supra. Under these circumstances it is clear that a guilty plea must be vacated")

plea of the "character of a voluntary act." Machibroda v. United States, supra, at 493. Cf. Bram v. United States, 168 U.S. 532, 542-543." Id. at 266. Further, Justice Douglas noted, "The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain[.] . . . As one author has stated, the basis for outright vacation is "an outraged sense of fairness" when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966)." Id. at 266.

In Puckett, the Fifth Circuit acknowledged that the Government had breached the plea agreement. Applying the "plain error" standard, however, the Fifth Circuit denied Puckett's request to have his plea vacated. If the Fifth Circuit had used the "de novo" test, following Santobello, once the breach was established, it would have remanded the case to the district court for resentencing or for withdrawal of the plea. Defendant Puckett respectfully requests certiorari be granted to resolve the conflict among Circuits as to what standard should be applied when a Defendant appeals a sentence based on a breach of a plea agreement, but did not raise this issue at sentencing.

II. Even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, did the Fifth Circuit err when it failed to find "plain error" was established when the breach of the plea agreement was admitted and the plea was obtained in exchange for these promises?

Even in Circuits that have adopted the "plain error" standard in situations where a Defendant does not object to a breach of the plea agreement at sentencing, there is a wide disparity as to what that standard actually means. The Puckett decision is an example of a conventional application of a Rule 52(b) "plain error" evaluation, in which the three prong test is applied. After determining the first two prongs had been met, the Puckett court held;

> Concerning the third prong, whether this error affected a substantial right, Puckett has not carried his burden of showing prejudice. . . . Puckett has made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility. The record indicates exactly the opposite. Absent proof of prejudice, Puckett cannot establish plain error and is not entitled to relief on a forfeited objection.

Id. at __. See also United States v. Ingraham, 238 Fed. Appx. 523, 525-526 (Unpub-11th Cir. 2007)"For an error to affect substantial rights, "in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778,

123 L. Ed. 2d 508 (1993). The party seeking to establish plain error has the burden of persuasion as to prejudice. See United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005). To establish prejudice, the defendant must show a reasonable probability of a different result. *Id.").*

Not all Circuits who apply the "plain error" standard apply it in this manner. Following Santobello, numerous decisions have held that proof a breach *is in and of itself* a showing of plain error, or at least triggers a much less onerous standard on the Defendant to show prejudice. For example, in United States v. McQueen, 108 F.3d 64, (4th Cir. 1997), the Defendant failed to object to the Government's breach of the plea agreement at sentencing, and the Fourth Circuit applied a "plain error" standard. However, the Fourth Circuit noted,

> The interpretation of plea agreements is guided by contract law, and parties to the agreement should receive the benefit of their bargain. Because a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or a breach thereof is conducted with greater scrutiny than in a commercial contract. When reviewing a breached plea agreement for plain error, therefore, we must establish whether the breach was "so obvious and substantial that failure to notice and correct it affected the fairness, integrity or public reputation of the judicial proceedings."

Id. at 66 (footnoted omitted). Applying this standard, the Fourth Circuit held:

> The Government's failure to argue the terms of the oral plea agreement to the district court at the sentencing hearing constituted a breach of the plea agreement. And because violations of plea agreements on the part of the government serve not only to violate the constitutional rights of the defendant, but directly involve "the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government," we hold that the Government's breach constituted plain error.

Id. See also Teeple v. United States, 15 Fed. Appx. 323 (Unpub. 6th Cir. 2000)(Clay, C.J., dissenting)("Furthermore, such a plain error--the government's failure to honor its obligations under the plea agreement--affects the integrity of our judicial system and should be corrected. United States v. Taylor, 77 F.3d 368, 372 (11th Cir. 1996); United States v. Mondragon, 228 F.3d 978, 981 (9th Cir. 2000) ("The integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement."); United States v. Barnes, 278 F.3d 644, 647-648 (6th Cir. 2002)("The fact that our review is guided by a plain error standard does not effect the application of Santobello, Cohen, and their progeny inasmuch as is well-settled that when a defendant pleads guilty in reliance on a plea agreement, he waives certain fundamental constitutional rights such as the right to trial by jury"); United States v. Saling, 205 F.3d 764, 766-67 (5th Cir. 2000) (summarily reversing when Government had breached plea agreement without specifying whether defendant had preserved his objection).

These cases show that Santobello requires a different "plain error" evaluation that is normally imposed under Rule 52(b). If such a "modified" plain error evaluation had been used in the instant case, the Fifth Circuit would have reversed and remanded. Defendant further requests that certiorari be granted to clarify the type of "plain error" evaluation to be used by the Circuits in cases where a defendant fails to object to the Government's breach of a plea agreement at sentencing.

Because this case presents a question implicating this Court's supervisory powers,[15] and an important question of federal law that has not been, but should be, settled by this Court, this Court should grant certiorari.

CONCLUSION

Because the Fifth Circuit violated the doctrines set forth in Santobello v. New York, 404 U.S. 257 (1971) when it applied a "plain error" standard of review to Defendant's appeal based on the government's admitted breach of the plea agreement and Defendant did not object to said breach at the time of sentencing, certiorari should be granted. In the alternative, even if "plain error" is the correct standard of review when a defendant does not object at sentencing to the Government's breach of a plea agreement, the Fifth Circuit erred when it failed to find "plain error" was

---

[15] See, e.g., Nguyen v. United States, 539 U.S. 69, 73-74 (2003) (granting certiorari to exercise this Court's supervisory powers to review whether court of appeals in reviewing criminal cases had departed from accepted and usual course of judicial proceedings).

established when the breach of the plea agreement was admitted and the plea was obtained in exchange for clear promises, and certiorari should be granted.

LARS ROBERT ISAACSON
Counsel for Petitioner

No. 07-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the

Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this th day of ___ 2008.

LARS ROBERT ISAACSON **
TX State Bar No. 24042988
401 East Corporate Drive, Suite 100
Lewisville, Texas 75057
Phone: (469) 948-4740
Fax: (972) 346-6500

** Counsel of Record

No. 08-_____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PROOF OF SERVICE

I, Lars Robert Isaacson, do certify that on March 3, 2008, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States mail, with

first-class postage prepaid. The Solicitor General, Assistant United States Attorney Susan Cowger, and the petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Solicitor General
Department of Justice
Washington, D.C. 20530

Susan Cowger
Assistant U. S. Attorney
1100 Commerce Street, 3rd Floor
Dallas, Texas 75242-1699

LARS ROBERT ISAACSON **
TX State Bar No. 24042988
401 East Corporate Drive, Suite 100
Lewisville, Texas 75057
Phone: (469) 948-4740
Fax: (972) 346-6500

** Counsel of Record

REPLY BRIEF

No. 07-9712

IN THE

Supreme Court of the United States

JAMES BENJAMIN PUCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(Counsel of Record)
401 East Corporate Drive
Suite 100
Lewisville, Texas 75057
(169) 948-1710

Attorneys for Petitioner

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

1. The Solicitor General agrees that certiorari should be granted in this case:

> We agree with petitioner . . . that there is a conflict among the courts of appeals on whether the plain-error standard applies to a forfeited claim that the government breached a plea agreement, as well as on how the plan-error standard should be applied in that context. Because the applicable standard of review in the plea-breach context is an important and recurring issue in the conduct of federal prosecutions, and because the question is squarely presented in this case, this Court's review is warranted.

Resp. Br. 9-10; *see id.* at 20-21. The Solicitor General's brief agrees there is no obstacle to certiorari in the facts or posture of this case. As the Solicitor General recognizes, the conflict in the circuits is broad and irreconcilable, the issue is important and recurring, and the question is well-presented here. Certiorari should be granted.

2. While agreeing that this Court's review is warranted, the Solicitor General contends that the judgment should be affirmed, on the ground that plain-error review under Rule 52(b) applies to a plea-agreement breach, and that the conceded breach here did not satisfy the requirements of Rule 52(b). The Solicitor General is incorrect. Plain-error analysis should have no application when a prosecutor breaches a plea agreement. The requirements of the plain-error rule are inconsistent with the reasoning of this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1972), which expressly declined to make an individualized showing of prejudice part of its consideration. And even if plain-error review applies, the breach of a plea

agreement nevertheless will ordinarily satisfy the requirements of Rule 52(b) and thus generally should constitute plain error *per se*.

a. In *Santobello*, this Court concluded that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise *must be fulfilled*." 404 U.S. at 262 (emphasis added). The Solicitor General notes that the Court did not apply plain-error review under Rule 52(b) because the error was objected-to and because the case arose from state court, where Rule 52 does not directly apply. Despite those distinctions, *Santobello* is directly relevant here because the Court did consider and reject a *harmless*-error argument that was, in substance, indistinguishable from the *plain*-error analysis applicable under Rule 52(b).

Arguing that the plea-breach was harmless, the State of New York in *Santobello* had pointed to the trial judge's assurance that "I am not at all influenced by what the District Attorney says." *Id.* at 259. Instead, the judge had professed to rely entirely on the probation report, which revealed that Santobello, a convicted murderer, was "notorious" and "has an unbroken record of vicious criminality. He is not amenable to any restraint and is completely asocial. He should be among the last persons to be a legitimate object of leniency." *People v. Santobello*, 39 A.D.2d 654, 655-56 (N.Y. 1st Dept. 1972) (Steuer, J., dissenting). The trial judge agreed with the probation report and sentenced Santobello to the maximum sentence of one year. 404 U.S. at 258. Indeed, the report was so damning as to permit the State to argue in this Court that "Santobello must have appreciated that, in view of his

criminal record, he could hardly have escaped incarceration under any circumstances." Resp. Br. at 11, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133497. And Santobello himself harbored no illusions about faring better on remand – he freely acknowledged that he "would face a substantially stiffer sentence if permitted to go to trial on the original charges" and convicted on remand. Petr. Br. at 12-13, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133498. But he argued that the issue here was "not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation." *Id.* at 9.

This Court agreed, and reversed the judgment *without inquiring into prejudice*, warning that "at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." 404 U.S. at 262. The Court noted that it had "no reason to doubt" that the trial judge had not been influenced by the breach, but reversal was nonetheless required. *Id.* at 263. Its reasoning was straightforward: although plea bargaining is an important tool whose use should be encouraged, the considerations in its favor all "presuppose fairness in securing the agreement between an accused and a prosecutor." *Id.* at 261.

Contrary to the Solicitor General's submission, *Santobello's* analysis is controlling here even though that case was not formally governed by Rule 52, as this case is. It was clear by the time *Santobello* was decided that the presence of a constitutional error in a state-court judgment alone would not warrant reversal; ordinarily, some degree of prejudice must be shown, at least enough to survive harm-

less-error analysis. *See Chapman v. California*, 386 U.S. 18, 22-23 & n.5 (1967) (clarifying that harmless-error review is appropriate in review of constitutional errors in state-court judgments and adopting the federal definition of harmless errors as those errors that "affect substantial rights," citing Rule 52(a), among other sources). Yet, despite the State's obvious (and persuasive) effort to show that Santobello had suffered no prejudice from the breach of his plea agreement – in the sense that he would not have secured a shorter sentence – this Court reversed. Its decision to do so, consistent with its reasoning that fairness in plea bargaining is a fundamental presupposition of its usefulness, demonstrates that actual prejudice is an irrelevant consideration.[1] The court of appeals in this case thus erred by requiring actual prejudice under plain-error analysis.

b. Even if plain-error review formally applies, the breach of a plea agreement should normally constitute plain error *per se*. That is the only alternative implication that can logically be drawn from *Santobello*. Such a rule would also be consistent with this Court's observation in *Santobello* that the considerations favoring the use of plea agreements "presuppose fairness in securing agreement between the accused and a prosecutor." 404 U.S. at 261. Without such a predicate of fairness, no faith can be had in the result obtained; the entire "bargain" is tainted. The Court's reasoning in *Santobello* echoes the logic of its structural-error cases, which presume

---

[1] The prejudice that must be shown under harmless-error analysis is, of course, the same kind of prejudice that must be shown under plain-error analysis. *United States v. Olano*, 507 U.S. 725, 734 (1993) ("Rule 52(b) normally requires the same kind of inquiry" into prejudice that is required under a harmless-error analysis, except that the burden of proof is on the defendant).

error. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself"); *Gonzalez v. United States*, 128 S. Ct. 1765, 1772 (2008) (structural-error doctrine "recognizes that some errors necessarily render a trial fundamentally unfair" (citation and quotation marks omitted)). Thus, at least in cases like this one, where there is admittedly "error" that is "plain," the third and fourth requirements of ordinary plain-error review – that the error affects substantial rights and the fairness, integrity, or public reputation of judicial proceedings[2] – should be established *per se*.

The Solicitor General suggests that this "approach conflicts with this Court's binding interpretation of the requirements of Rule 52(b)," because it "fail[s] to demand that the defendant demonstrate the plainness of the error and its effect on substantial rights." Resp. Br. 20. Not so. The point is simply that an *admitted breach* of a plea agreement is always an obvious error, and that such an error *necessarily* causes prejudice to the defendant, as the *Santobello* Court recognized. Although a given case might fail plain-error review if the existence of the breach itself was a matter of dispute – such a breach might not be "plain" within the meaning of plain-error review, *see id.* at 19 – that is certainly not this case. The Solicitor General fully concedes that the prosecutor "breached the written plea agreement" below, and that the "breach was also obvious." *Id.* at 12. The Solicitor General also agrees that "the government should not be allowed to induce a defendant to waive

---

[2] *Cf. Santobello*, 404 U.S. at 262 (indicating remand was required in "the inter-

his rights through attractive terms of agreement and then violate the agreement with impunity." *Id.* at 16. To prevent that result here, certiorari should be granted, and the judgment reversed.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(Counsel of Record)
401 East Corporate Drive
Suite 100
Lewisville, Texas 75057
(469) 948-4740

August 11, 2008

---

ests of justice").

TABLE OF CONTENTS

Page

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES 1
CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante,
499 U.S. 279 (1991) 5

Chapman v. California,
386 U.S. 18 (1967) 4

Gonzalez v. United States,
128 S. Ct. 1765 (2008) 5

People v. Santobello,
39 A.D.2d 654 (N.Y. 1st Dept. 1972) 2

Santobello v. New York,
404 U.S. 257 (1972) ..... passim

United States v. Olano,
507 U.S. 725 (1993) 4

OTHER AUTHORITIES

Petr. Br., *Santobello v. New York*,
No. 70-98 (U.S. 1971) 3

Resp. Br., *Santobello v. New York*,
No. 70-98 (U.S. 1971) 3

REPLY BRIEF

Supreme Court, U.S.
FILED
JAN 7 - 2009
OFFICE OF THE CLERK

No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTROUDCTION 1

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT RESULTS IN THE INVOLUNTARY WAIVER OF CONSTITUTIONAL RIGHTS 4

II. RULE 52(b) SHOULD NOT AND NEED NOT GOVERN WHEN DEFENSE COUNSEL DOES NOT OBJECT TO A PLEA-AGREEMENT BREACH 12

A. The Involuntary Character Of Puckett's Waiver Mandates Reversal 12

B. The Plain-Error Rule Serves No Meaningful Function In This Context Because It Is Necessarily Satisfied By The Breach Of A Plea Agreement 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Bousley v. United States,
523 U.S. 614 (1998) 15

Brown v. Mississippi,
297 U.S. 278 (1936) 14

Henderson v. Morgan,
426 U.S. 637 (1976) 14

Hill v. Lockhart,
474 U.S. 52 (1985) 18

Mabry v. Johnson,
467 U.S. 504 (1984) 2, 5, 6, 19

Machibroda v. United States,
368 U.S. 487 (1962) 15

McCarthy v. United States,
394 U.S. 459 (1969) 15

Morgan Stanley Cap. Group v. Pub. Utility Dist. No. 1,
128 S. Ct. 2733 (2008) 3

Nguyen v. United States,
539 U.S. 69 (2003) 15

Rose v. Clark,
478 U.S. 570 (1986) 22

Santobello v. New York,
404 U.S. 257 (1971) ..... passim

United States v. Booker
543 U.S. 220 (2005) 9

United States v. Bownes,
405 F.3d 634 (7th Cir. 2005) 8, 9

United States v. Dominguez Benitez,
542 U.S. 74 (2004) 13, 14, 19

United States v. Hyde,
520 U.S. 670 (1997) 20

United States v. Rivera,
365 F.3d 213 (3d Cir. 2004) 13

United States v. Vaval,
404 F.3d 144 (2d Cir. 2005) 11

United States v. Vonn,
535 U.S. 55 (2002) 12, 13

Washington v. Recuenco,
548 U.S. 212 (2006) 16

RULES

Fed. R. Crim. P. 11 13

Fed. R. Crim. P. 52 ..... passim

TREATISES

Corbin, Arthur Linton,
Corbin on Contracts (1962) 8, 12

OTHER AUTHORITIES

Federal Judiciary, *Judicial Business of the United States Courts 2007* 22

INTRODUCTION

Two undisputed facts frame the question at issue in this case.

First, the Government induced petitioner Jimmie Puckett to waive his right to a jury trial and plead guilty by promising him, in writing and without condition, that the Government would advise the court at sentencing that Puckett qualified for a three-level reduction in his offense level. Puckett has consistently contended, and the Government has never disputed, that if the Government had not made that promise to Puckett, he would not have pleaded guilty, but instead would have exercised his right to contest the Government's case through a trial before a jury of his peers.

Second, the Government unambiguously breached the promise it made to induce Puckett's guilty plea. Not only did the Government fail to advise the Court that Puckett qualified for a three-level reduction as it promised it would, it actively argued *against* such a reduction. In the words of the Solicitor General's brief: "[B]y opposing a downward adjustment in petitioner's offense level for acceptance of responsibility, [the Government] breached the agreement it made with petitioner that he had demonstrated acceptance of responsibility." Gov. Br. 41. The Government evidently decided to violate its promise because Puckett had allegedly engaged in subsequent criminal conduct, but the Government now acknowledges that the plea agreement *could* have been written—*but was not*—to condition the Government's performance of its promise on Puckett's subsequent conduct. *Id.* Instead the Government chose for whatever reason to make its promise unconditional, and thus, "[u]nder the explicit

terms of the agreement . . . the government's breach was obvious." *Id.*

Those two undisputed facts lead inexorably to a crucial legal consequence, one firmly established by this Court's precedents: because the Government violated the unconditional promise it made to induce Puckett's voluntary trial waiver and guilty plea, that waiver and plea can no longer be considered voluntary, and the conviction obtained as a result of the involuntary plea therefore must be deemed void as a matter of due process. The principle enunciated by this Court could hardly be clearer or more specific: "[W]hen the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry v. Johnson*, 467 U.S. 504, 509 (1984).

That basic rule is not open to serious question. Rather, the essential issue here is whether that rule applies, requiring reversal of the effectively coerced conviction, when the defendant's lawyer fails to object at sentencing to the Government's breach of a promise made to induce the plea.

The Government contends that reversal is not required in all such cases, because in some situations—including the case at bar, the Government says—the defendant's own actions may drain the Government's earlier promise of all material value to the defendant, thereby excusing the Government from performance of its express contractual obligation. That contention is as wrong as it is brazen. It is fundamental maxim of contract law that a party's duty to perform an obligation is not excused simply by fluctuation in the value of that obligation to the other party. And there is cer-

tainly no principle allowing a party to escape performance simply on the basis of its *own perceived sense* of the value of performance to the other party. The terms of the contract itself define the value of the performance, and unless the contract expressly contemplates some different performance based on changing circumstances, the contract terms must control as written. *Cf. Morgan Stanley Cap. Group v. Pub. Utility Dist. No. 1*, 128 S. Ct. 2733, 2746 (2008) ("It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market.").

That maxim should apply with special force in the plea agreement context. This Court's precedents have repeatedly recognized that the defendant *personally* must announce his voluntary decision to waive trial rights and plead guilty—even defendant's counsel cannot speak for the defendant in waiving those rights. It is surely less plausible that the *prosecutor* should be given the authority or the incentive to decide if and when a Government obligation is valuable enough to the defendant to mandate the Government's promised performance. Just as it is for the defendant alone to decide whether a Government promise is valuable enough to justify a waiver of trial rights in the first instance, it also must be for the defendant alone to decide whether that promise remains valuable enough to justify the waiver, or whether changed circumstances should permit some different performance by the Government. That is why the failure of the defendant's lawyer to ensure full performance of the Government's promise at sentencing is effectively irrelevant to appellate review of a plea-agreement breach—since the central question in such a case must be whether the

defendant's plea remained voluntary despite the breach, the defendant's state of mind is what matters, not whatever statements his lawyer made, *or did not make*, on his behalf. And because defense counsel's silence can have no bearing in this situation, Rule 52(b)—which by definition applies only where a defense counsel's objection silence *is* relevant—has no meaningful application. Even to the extent it does apply, its specific factors will be satisfied every time the Government induces a defendant to plead guilty through a promise the Government subsequently refuses to perform.

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT RESULTS IN THE INVOLUNTARY WAIVER OF CONSTITUTIONAL RIGHTS

The Government agrees that a "guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." Gov. Br. 27 (citations and internal quotation marks omitted). It further agrees that voluntariness is a requirement of due process, and that the "voluntariness of a guilty plea is assessed in part by whether unfulfilled or unfulfillable promises induced the plea." *Id.* at 28 (quotation omitted). And it finally agrees that the Government "should of course fulfill all its promises in a plea agreement." *Id.*

These concessions should end the matter, for it is undisputed that the plea here was induced by an unfulfilled promise, which thus negated the voluntariness of the waiver embodied in the plea. In effect, the conditions under which Puckett voluntarily waived his rights were supplanted by *different* grounds supplied

by the Government without his consent. His failure to expressly assent to the new grounds deprived the plea of its voluntary character.

The Government nonetheless argues that the voluntariness of Puckett's plea in this case cannot be questioned because the Government's forgone performance had no actual value to Puckett at the time of breach. *Id.* at 28-29. It quotes this Court's observation in *Mabry* that "only when it develops that the defendant was not fairly apprised of its *consequences* can his plea be challenged under the Due Process Clause." *Id.* at 28 (quoting 467 U.S. at 509) (emphasis added). Seizing on the word "consequences," the Government asserts that under the rule articulated in *Mabry*, and applied previously in *Santobello v. New York*, 404 U.S. 257 (1971), the voluntariness inquiry in a plea-agreement breach situation must focus on whether the defendant "received the benefit for which he bargained." Gov. Br. 28. Because the trial court would have given Puckett the same sentence regardless of the Government's recommendation, the argument goes, the Government's promise no longer had real value to Puckett, and thus the violation of that promise did not actually change the terms of the earlier agreement.

The argument is meritless. As a matter of law, it misreads *Mabry*, effectively overrules *Santobello*, and ignores basic principles of contract. And as a matter of fact, it is belied by the record in this case.

Mabry itself does not define "consequences" as narrowly as the Government would. In the same paragraph of the opinion on which the Government relies, *Mabry* makes clear that "[i]t follows" from the requirement that a plea agreement be entered voluntar-

ily "that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." 467 U.S. at 509. There is no reference to the ultimate sentence as a relevant "consequence" of a plea agreement. The only consequence expressly contemplated by a plea agreement, and the only consequence mentioned in *Mabry*, is the performance promised by the Government and expected by the defendant. Indeed, since neither the defendant nor the Government can control the court's sentencing decision, the *only* consequence relevant to the defendant's decision to plead in this context is the promised sentencing recommendation. That is the most the defendant can bargain for, in other words, but it still has great value—as evidenced by the continued prevalence of plea agreements. The value to the defendant is simply that the Government's recommendation will have certain persuasive force with the Court.

Indeed, contrary to the Government's submission here, a prosecutor's sentencing recommendation may have *greater* value to a defendant, where subsequent developments might otherwise influence the court adversely to the defendant. The fact that a prosecutor stands before the Court and puts the weight of the United States behind a given sentencing recommendation, despite factors that might suggest a higher sentence, might well persuade the court to ignore those factors and accept the prosecutor's recommendation. Or at least a defendant could reasonably believe that to be the case, demonstrating that a Government sentencing promise made to induce a plea may have continuing or even greater value *to the defendant*, no

matter what circumstances transpire subsequent to the plea agreement.

Santobello also demonstrates that the relevant "consequences" are not only those that are reflected in the ultimate sentence. In that case, all parties—prosecutor, defendant, and even trial judge—agreed that the breach of the plea agreement had no effect on the chosen sentence. And there was likewise no dispute that Santobello was in a much better position than he would have been had he gone to trial and been found guilty, even notwithstanding the prosecutor's breach. *See* Pet. Br. 15. But Santobello's objection was to the means by which his guilty plea was obtained, and not to the ultimate "consequence" in his sentence. This Court agreed, holding that it is a "constant factor" in the guilty-plea context that any governmental promise that induces a guilty plea "must be fulfilled," and thus it is a necessary "safeguard[]" that plea agreements be faithfully enforced. 404 U.S. at 262. Not only did the Court not articulate an exception for cases in which a breached promise has no effect on the ultimate sentence, it *expressly rejected* such an exception, which was sought by the prosecution in that case. *Id.* Thus, the only way to adopt the Government's interpretation of *Mabry*'s reference to the "consequences" of a plea agreement is to decide that *Mabry* quietly overruled *Santobello*—a case that *Mabry* repeatedly cites as authoritative.

Quite apart from its misapplication of this Court's precedent on plea agreements specifically, the Government takes a position that makes no sense as a matter of basic contract law. Ordinarily, a breach requires a remedy regardless of the parties' expectations as to value of future performance. As the Government

itself argues, the parties to a plea agreement in which the prosecutor promises to make (or to abstain from making) a sentencing recommendation cannot know the actual value of that promise at the time of formation. Gov. Br. 28 ("The actual value to the defendants of that promise cannot be known at the time the plea agreement is entered . . . ."). This kind of uncertainty is not uncommon in contracting—the Government's stock trading analogy is one example. Gov. Br. 31. But the general rule in contract cases (including those involving agreements for future sale of stock) is that fluctuation in the value of a future obligation *does not excuse performance*—"[t]he risk of decline in value before completion of performance rests on the promisee; and the promisor is not excused from performing the agreed terms by the fact that a great increase in the value or cost of his performance has occurred." 6 Arthur Linton Corbin, *Corbin on Contracts* § 1360, at 485 (1962); *see also United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005) (noting with respect to plea agreements that "[b]y binding oneself one assumes the risk of future changes in circumstances in light of which one's bargain may prove to have been a bad one").[1]

---

[1] The Government argues that petitioner's reference to "material" terms and breaches undermines his argument that a breach always vitiates the voluntariness of a plea agreement. Gov. Br. 27 n.8. This argument is misplaced. "In one sense of the word, there is never such a thing as an immaterial breach. For any breach of contract, an action lies; any breach is material enough for that, although if no substantial injury is shown the damages recoverable are only nominal." 4 Corbin § 946, at 813 (1951). Petitioner intended only to allow for the possibility that some deviations from the terms of an agreement may be demonstrably immaterial—such as when a defendant makes clear on

The Government's rule—that "voluntariness" should depend entirely on whether the defendant understood the "consequences" of his plea only in the sense of its ultimate impact on sentence—would produce untenable results. An intervening change in the law, for example, could cause a defendant who had no reason to anticipate the change to regret having agreed to waive his rights to appeal. The Seventh Circuit confronted precisely such a case in *Bownes*, in which the defendant sought to be excused from his waiver of appellate rights after this Court decided *United States v. Booker*, 543 U.S. 220 (2005). The defendant believed he would have been entitled to a more favorable sentence under *Booker*, and he thus argued "that his waiver was not knowing and intelligent because he had no reason to anticipate the ruling in *Booker*." 405 F.3d at 636. But in *Bownes* the prosecutor had not breached the agreement, and the defendant was therefore bound by it, notwithstanding his failure to appreciate the full value of his waiver at the time he made it. *Id.* at 636-37. Under the theory of voluntariness offered by the Government here, the *Bownes* decision could not stand because the defendant did not foresee the "consequences" of his decision to waive his appellate rights.

The Government invokes the illustration of "defendants *A* and *B*" to support its argument that breach of a plea agreement does not necessarily vitiate the voluntariness of the agreement. Gov. Br. 26-27, 28-29. In this illustration, defendant *B* receives a *better* sen-

---

the record that a particular provision in the plea agreement is not "part of the inducement or consideration" for his plea. *Santobello*, 404 U.S. at 262. That is plainly not the case here.

tencing result as a consequence of a breach, which the Government cites as establishing that some breaches do not result in involuntary pleas that violate due process. But of course the Government invokes a hypothetical illustration only because it can cite *no actual cases* in which a prosecutor breached a sentencing agreement and clearly made the defendant better off as a result. And if such cases did exist they would hardly be relevant here, since few if any defendants would want to rescind a prior plea agreement as involuntary where they ended up with more than they possibly could have expected under the original bargain.[2] The appellate cases the Government does cite do not involve breaches that effectively improved the defendant's bargain, and they do nothing to undermine the rule of *Santobello* and *Mabry* that the more typical plea agreement breach vitiates the voluntari-

---

[2] Such cases also would represent the only circumstance where one could say with *certainty* that an unfulfilled promise did not adversely affect the substantive terms of the original bargain, since the defendant literally got more than he bargained for. While it may be fair to say that due process is not violated in that unusual (perhaps nonexistent) situation, in any other situation it will be impossible to know with certainty what the outcome might have been had the Government fulfilled its promise. As even the Government says here, all the defendant bargains for is "a *chance*" that the court will be influenced by the prosecutor's recommendation. Gov. Br. 28. But when the Government refuses even to make the promised recommendation, the defendant loses *the entirety of his bargain*, i.e., any "chance" at all that the court might be influenced, however slightly, by the Government's sentencing recommendation. In that situation, it is not for prosecutors, or appellate courts, to speculate post hoc about the value of the chance the defendant bargained for, based on whatever variable circumstances arose by the time of sentencing.

ness of the plea and thus necessarily compels reversal of the underlying conviction.[3]

The Government's contention likewise fails as a matter of contract law even if its failure to perform could somehow be justified on grounds of frustration of purpose.[4] When facts operate "to discharge a defendant from further duty, the law does not permit him to retain the benefits of a performance rendered by the plaintiff without making just compensation

---

[3] The best example of this is *United States v. Vaval*, 404 F.3d 144 (2d Cir. 2005), which entirely vindicates Puckett's position. The Government quotes *Vaval* for the proposition that "not every breach requires a remedy." Gov. Br. 29 (alteration and quotation omitted). But what *Vaval* says right after this statement is that "[w]hether a breach by sentence advocacy caused prejudice in the form of an increased sentence is irrelevant to the need for a remedy," citing *Santobello*. 404 F.3d at 154. It then goes on to outline two situations in which no remedy is required, neither of which reflects the Government's theory that plea agreement breaches can be ignored absent a demonstrated effect on the sentence, and neither of which applies here. The first is the "curative performance exception," which applies when the prosecutor ultimately *does* perform under the agreement after an initial breach, which obviously did not happen here. *Id.* at 155. The second, "a very limited exception," applies where "the violation is so minor that it does not cause the defendant to suffer any meaningful detriment." *Id.* As the court clarified, a "minor" violation is *not* determined by whether the breach "affect[ed] the sentence," but whether "the essential elements of the agreement were fulfilled." *Id.* at 155 n.5. This analysis fully supports petitioner's position on materiality, *see supra* note 1, and has no relevance here, where the breach involved a Government promise that was which was "unquestionably the centerpiece of the agreement." *Id.* at 156. Indeed, *Vaval* holds that in these circumstances, the Court "must order a remedy." *Id.*

[4] The Government hints at such an argument without expressly making it. *See* Gov. Br. 39-44.

therefor." 6 Corbin § 1368, at 519. Thus, even if the Government's failure to perform could be justified, it "must make full restitution" of consideration received from Puckett—which means the guilty plea must be vacated. *Id.*

Finally, the Government's theory fails in this case even on its own terms. The Government argues that its breach requires no remedy because performance of its duty would have been of no value to Puckett. Gov. Br. 30, 42. But if that were the case, the Government would have simply made the recommendation it agreed to make, knowing that the trial judge would reject it in light of the contentions set forth in the new PSR. By refusing to do so, the Government implicitly (but unmistakably) acknowledged that the value of its promise to Puckett—even if substantially reduced—had not dwindled entirely to zero. Its contention that its breach did not render Puckett's plea involuntary as a matter of due process is simply untenable.

II. RULE 52(b) SHOULD NOT AND NEED NOT GOVERN WHEN DEFENSE COUNSEL DOES NOT OBJECT TO A PLEA-AGREEMENT BREACH

A. The Involuntary Character Of Puckett's Waiver Mandates Reversal

An involuntary waiver of trial rights is ineffective, requiring reversal on direct appeal even if no objection was lodged below. Pet. Br. 17. The Government disagrees, relying on *United States v. Vonn*, 535 U.S. 55 (2002). Gov. Br. 32. According to the Government, *Vonn* signifies that "Rule 52(b) applies even when the nature of the claimed error is that the defendant did not make an informed waiver of his trial rights." *Id.*

The Government misapprehends the ruling in *Vonn*. That case, like *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) (discussed at Pet. Br. 27), involved an asserted error by the trial court in complying with the "details" of "Rule 11 colloquies," *Vonn*, 542 U.S. at 70, not an error completely erasing the central promise on which the defendant relied in entering the plea. *See United States v. Rivera*, 365 F.3d 213, 213 (3d Cir. 2004) (opinion of the panel sur denial of rehearing en banc) ("Because breach of plea agreement is not an issue addressed by Rule 11, *Vonn*'s holding does not apply . . . ."). Rule 11 requires a trial court to assure itself that the defendant has arrived at a plea voluntarily. Its purpose is chiefly to document voluntariness, not produce it. In *Dominguez Benitez*, this Court noted that proof of prejudice was required in part "because the violation claimed was of Rule 11, *not of due process*," 542 U.S. at 83 (emphasis added), and it further emphasized the "contrast" between a Rule 11 violation and "the constitutional question whether a defendant's guilty plea was knowing and voluntary," *id.* at 84 n.10. As these statements suggests, when the asserted violation goes directly to the voluntariness of the plea and thus *does* implicate due process, the pertinent rule comes not from cases construing Rule 11, but from constitutional cases—including but not limited to *Santobello*—which *mandate* reversal of a conviction obtained by a plea that a defendant was coerced into, whether it be by confusion, mistake, fraud, or otherwise. *Dominguez Benitez* itself articulates a version of this rule: "[W]hen the record contains no evidence that the defendant knew of the rights he was putatively waiving, the conviction *must be reversed*," even if there is "overwhelming evi-

dence that the defendant would have pleaded guilty regardless." *Id.* (emphasis added).

In other contexts involving review of unpreserved objections to Government misconduct leading to conviction, this Court has distinguished between claims of "mere error" and more fundamental challenges to the fairness of the conviction, consistent with Puckett's position here. In *Brown v. Mississippi*, 297 U.S. 278 (1936), for example, the Court reversed a conviction in a case in which the defendants had been tortured until they confessed. The State argued that the defendants had failed to move for the exclusion of the confessions after it had been proven at trial that they had been coerced. This Court refused to rely on the asserted forfeiture to look past the coercion, explaining that the "complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." *Id.* at 286. The same principle applies here, as *Mabry* and *Santobello* make clear: when the Government induces a defendant to plead guilty by making promises that turn out to be false, it is simply another form of coercion, less gruesome but no more permissible. And where the Government coerces a defendant into waiving key trial rights—rights that only a defendant can *personally* waive—the lack of objection by counsel is simply irrelevant. *See* Pet. Br. 12; *Henderson v. Morgan*, 426 U.S. 637, 646 (1976) (reversing conviction based on involuntary plea despite lack of objection by counsel).[5]

---

[5] The Government contends that *Henderson* is not relevant because it does not expressly describe a standard of review appli-

The Government acknowledges, as it must, that the "unique nature" of some errors requires reversal absent both an objection and a showing of specific prejudice under Rule 52(b). Gov. Br. 34 (citing *Nguyen v. United States*, 539 U.S. 69, 74-75 (2003)). The Government protests that "*Nguyen* bears no resemblance to this case," Gov. Br. 34, but the Government misses the point. Puckett fully acknowledges that the "error in this case is different from the error in *Nguyen*." Pet. Br. 21. But the *principle* recognized in *Nguyen* is that some unpreserved errors fall outside Rule 52(b) and require reversal as a matter of constitutional or statutory principles antecedent to the permissive requirements of Rule 52(b), which allows, but does not require, appellate courts to reverse convictions for

---

cable where defense counsel did not object to an error rendering a plea involuntary, and this Court later held in *Bousley v. United States*, 523 U.S. 614 (1998), that "procedural-default principles apply with equal force to claims that involve allegedly involuntary guilty pleas." Gov. Br. 33. But *Bousley* involved a *collateral* attack on a plea through a habeas petition, and the case was applying the significantly more stringent procedural-default rules governing all habeas claims, which "strictly limit[] the circumstances under which a guilty plea may be attacked on collateral review." 523 U.S. at 621. *Bousley* does nothing to undermine *Henderson*'s key premise that an involuntary guilty plea is simply *void* as a matter of due process, *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises . . . which deprive it of the character of a voluntary act, is void."), which would logically require reversal on direct appeal in all cases even absent a defense counsel objection, especially since defense counsel cannot forfeit a defendant's right to plead not guilty.

other types of unpreserved errors, as to which reversal is not already mandatory. Pet. Br. 21.[6]

B. The Plain-Error Rule Serves No Meaningful Function In This Context Because It Is Necessarily Satisfied By The Breach Of A Plea Agreement

Once the involuntariness of a defendant's trial-rights waiver is established, application of the Rule 52(b) factors add little or nothing to the analysis, because they will be satisfied in any case involving the Government's breach of a promise material to the defendant's decision to waive trial rights and plead guilty voluntarily. One therefore can say that the Rule 52(b) factors should not apply because they do no work, or one can say that the factors do apply but always work. Either way, a plea-agreement breach re-

---

[6] For the reasons discussed in the text, reversal should be mandatory for an unpreserved objection to a plea-agreement breach without regard to Rule 52(b)'s specific requirements, whether or not such a breach is described as a "structural error." *See* Pet. Br. 22 n.5. If it is considered a structural error, Rule 52(b) should be categorically inapplicable. Because a structural error is one that "necessarily render[s] a criminal trial unfair or an unreliable vehicle for determining guilt or innocence," *Washington v. Recuenco*, 548 U.S. 212, 218-219 (2006), a structural error can never be harmless under Rule 52(a). And the critical difference between Rule 52(a) and Rule 52(b) is simply which party bears the burden of proving prejudice—the Government bears the burden of proving lack of prejudice for a preserved error under Rule 52(a); the defendant must prove prejudice for an unpreserved error under Rule 52(b). But if a "structural error" *necessarily* makes a trial unfair or unreliable, then prejudice *always* exists, so it should not matter which party bears the burden concerning prejudice.

quires reversal even if the defendant's counsel did not object to the breach.

1. The first two Rule 52(b) factors ask whether there is an error, and whether it is "plain" or obvious. As noted above, the Government concedes the obviousness of the breach here, and it does not dispute that a material breach will be obvious in almost all cases. Pet. Br. 25 n.6. The Government also correctly identifies an error in petitioner's opening brief, which contended that Rule 52(b) cannot be applied to plea-agreement breach because they normally will not be obvious to the court. That is incorrect, given the requirements of Rule 11. Gov. Br. 20. But that hardly suggests that Rule 52(b) sensibly applies to plea-agreement breaches; to the contrary, it only further establishes that every material breach will (or should be) obvious to the court, so that the obviousness inquiry becomes largely meaningless in this context.

2. The first Rule 52(b) factor that even arguably matters in this context is the third, i.e., whether the error prejudices the defendant's substantial rights. As *Santobello* and other cases firmly establish, the breach of promise made to induce a plea *necessarily* prejudices the defendant's right to plead guilty voluntarily, with an accurate understanding of the conditions, benefits, and consequences of his plea.

The Government's sole response is that prejudice cannot be measured by the effect on the defendant's decision to plead guilty, but must focus solely on whether the defendant's *sentence* would have been different absent the breach. Gov. Br. 35-37, 42. As affirmative support for this position, however, the Government cites nothing more than circuit-court precedents examining prejudice to the sentence (Gov. Br.

36-37), none of which actually *justifies* that approach in light of clear precedents like *Santobello* and *Mabry* requiring focus on the guilty plea induced by the unfulfilled promise.

Beyond its empty circuit-court citations, the Government can only contend that its proposed focus on the sentence is "consistent" with and "not . . . contrary" to the relevant precedents of this Court. Gov. Br. 36-37. Notably, the Government does not even attempt to contend that any precedent of this Court actually *supports* focusing on the sentence rather than the plea. And its efforts to distinguish away the relevant precedents fall woefully short.

The Government ignores *Mabry* and *Brady*, but it does contend that *Santobello* permits courts to focus solely on the sentence and to ignore the plea. Gov. Br. 37. The basis for this conclusion is a mystery—the Government's own discussion of *Santobello* says nothing of the kind. The Government merely recites various facts about *Santobello* (Gov. Br. 37-38), and then simply asserts that *Santobello* "says nothing about whether and how the plain-error standard should be applied in federal cases, subject to Rule 52(b)," where nobody objects to the plea-agreement breach. *Id.* at 38. But the question obviously is not whether *Santobello* expressly enunciates the Rule 52(b) standard—as a constitutional case arising from state court, Rule 52(b) plainly had no direct application. The question here is simply whether *Santobello* says anything about what constitutional *rights* are *prejudiced* by a plea agreement breach. And *Santobello* could not be clearer: the constitutional problem focuses entirely on the voluntariness of the defendant's plea, *not* on the propriety of whatever sentence the court might enter

following the plea breach—the principle later reiterated in *Mabry* (and ignored by the Government). Pet. Br. 14-15. Indeed, *Santobello* expressly holds that any effect on the sentence is *categorically irrelevant* to the constitutional violation perpetrated by the plea-agreement breach. 404 U.S. at 262. That holding (also ignored by the Government) necessarily governs the question under Rule 52(b) of which rights were prejudiced by an obvious plea agreement breach to which defense counsel did not object.

The Government also contends that an approach to prejudice focusing on the sentence and ignoring the plea is "consistent with" *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) and *Hill v. Lockhart*, 474 U.S. 52 (1985). As petitioner's opening brief demonstrated, the Court in those cases specifically noted that, where a defendant asserts prejudicial error in a plea proceeding, the proper inquiry is on whether the defendant would have entered the plea absent the error. As noted above, *Dominguez Benitez* went even further, explaining that "when a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving," it the plea cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." 542 U.S. at 84 n.10. In other words, prejudice is virtually automatic when the plea is obtained under conditions that render it involuntary. The Government contends that these cases are inapplicable because they involve an "error related to the process through which the guilty plea itself was entered," while this case "relates to the *execution* of a plea agreement." Gov. Br. 37. But as already shown, *Santobello* and *Mabry* make clear "that when the

prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509. That is, the breach of an agreement *does* relate back to the "process through which the guilty plea itself was entered," Gov. Br. 37, by falsifying an essential condition on which the plea was predicated.

There is no dispute in this case that Puckett would not have entered the plea agreement if the Government had not made an unconditional promise to advise the court that he qualified for the three-level sentence reduction. Thus, prejudice to his substantial rights is clearly established under the rule of *Hill* and *Dominguez Benitez*, just as it is categorically assumed under *Santobello* and *Mabry*.

3. The breach of a plea agreement always seriously affects the fairness, integrity, and public reputation of judicial proceedings. The Government again disagrees, arguing that reversing a conviction when a breach has no effect on a sentence itself would bring disrepute upon the criminal justice system. Gov. Br. 39-40, 43-44.

This argument simply rehashes the Government's flawed insistence that prejudice to the sentence is all that matters, not prejudice to the plea itself. The Government does not even begin to explain why allowing prosecutors to make false promises about sentencing to induce guilty pleas *that otherwise would not be entered* reflects well on the fairness and integrity of the judicial system. Our system simply does not tolerate involuntary guilty pleas—it certainly does not excuse them simply because the misconduct that led to the coerced plea might not also have affected the

sentence entered after the constitutionally invalid conviction.

The Government further argues that a rule of automatic reversal would encourage defendants to "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess," in which a defendant unable to demonstrate an effect on his sentence would have "the option, often years after the fact, of putting the government to its proof." Gov. Br. 40 (quotation omitted). This argument is remarkable. The only way a defendant, even in theory, could ever treat plea bargaining as a "game of chess" in this context is *if the Government first violates a promise it made to induce the plea ab initio*. If the concern is for the system's integrity, the question must be, which rule incentivizes behavior more destructive to the system? A rule that allows the Government to escape the clear obligations of a plea agreement whenever it thinks a court can be persuaded that the obligation is not worth enforcing? Or a rule that allows the defendant to escape a prior agreement, but still face the prospect of a trial and/or plea re-negotation, if, but only if, the Government takes the first step of deciding unilaterally to violate its plea-agreement obligations? The answer should be clear. This is not a situation involving a harried trial-court judge forced to make many trial rulings on the fly, where parties generally must be expected to point out potential errors to help ensure a reasonably fair trial. Here the prospect of error, and hence the chance for any further "games," is entirely within the control of the Government. It can choose to abide by its promises, or it can choose to violate them. If it chooses the latter course, it is in no position to lecture the defendant victimized by such

deceit about the importance of fairness and integrity of the plea bargaining system. *See Santobello*, 404 U.S. at 262.[7]

The Government's protestations about gamesmanship by defendants ring especially hollow in this case. It is true, of course, that Puckett's trial counsel did not object to the breach of the plea agreement during sentencing. But *Puckett himself* openly complained that "I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here. . . . You know, promise for sentence reductions. I don't think they have happened." J.A. 104a. He did not sit on his hands and he was not playing games. He was plainly trying to explain to everyone in the courtroom that he did not get what he was promised in the plea agreement. The Government must have recognized that his protest was rooted in the agreement. But it was the Government that stood silent, no doubt hoping that neither Puckett nor his counsel would assert an adequately clear, express objection to the breach, so that the Government then could checkmate Puckett with Rule 52(b) on appeal, effectively immunizing its decision to

---

[7] The Government's assertion that allowing defendants to obtain reversal on appeal post-sentence would "often" add "years" to the case (Gov. Br. 40) is obviously overstated. The median time interval between the filing of a notice of appeal and the disposition of the appeal in a criminal case in federal court is 12.1 months. Federal Judiciary, *Judicial Business of the United States Courts 2007* tbl. B-4A, *available at* http://www.uscourts.gov/judbus2007/contents.html. That interval thus would normally impose little burden on the Government in terms of preparing a case for trial. In any event, any delay will always be of the Government's own making.

violate the unambiguous, unconditional promise it made to Puckett to induce him to plead guilty.

Although this case may constitute a particularly graphic illustration of the harm the Government inflicts on the integrity of the system when it decides to violate promises made to induce a guilty plea, the broader point is that such violations *never* reflect well on the system. Even to the extent the Government needs flexibility to respond to the kind of changed circumstances allegedly involved here, the answer is not to make unconditional promises and then violate them—the correct answer is to write plea agreements that allow for necessary flexibility, which can easily be done, as the Government acknowledges. Gov. Br. 41. Because the Government's breach of a plea agreement necessarily harms the fairness, integrity, and reputation of the judicial system and the plea bargaining process, this Rule 52(b) factor, too, does little meaningful work in any given case in which a defendant's counsel fails to object to such a breach.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings consistent with Fifth Circuit precedent.

Respectfully submitted,

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

January 7, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

KEVIN P. MARTIN
DAHLIA S. FETOUH
Counsel of Record
JODI B. KALAGHER
NATALIE F. LANGLOIS
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for *Amicus Curiae*

November 24, 2008

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Prosecutorial Breaches of Plea Agreements Undermine the Plea Bargaining Process and Pose Serious Consequences for the Criminal Justice System. 4

II. Whether Under the Plain Error Standard or Not, the Court Should Adopt a Rule Requiring Automatic Reversal for Breaches of Plea Agreements 11

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 15, 17

Berger v. *United States*,
295 U.S. 78 (1935) 9

Blackledge v. *Allison*,
431 U.S. 63 (1977) 12

Bordenkircher v. *Hayes*,
434 U.S. 357 (1978) 10

Bowers v. *State*,
500 N.E.2d 203 (Ind. 1986) 21

Brady v. *United States*,
397 U.S. 742 (1970) 5, 6

Brown v. *Mississippi*,
297 U.S. 278 (1936) 19

Commonwealth v. *Reyes*,
764 S.W.2d 62 (Ky. 1989) 21

Florida v. *Nixon*,
543 U.S. 175 (2004) 8

Gray v. *Mississippi*,
481 U.S. 648 (1987) 20

Johnson v. *United States*,
520 U.S. 461 (1997) 13, 15

Mabry v. *Johnson*,
467 U.S. 504 (1984) 12

Machibroda v. *United States*,
368 U.S. 487 (1962) 12

People v. *McCrory*,
41 Cal. 458 (1871) 4

Santobello v. *New York*,
404 U.S. 257 (1971) ..... *passim*

Swang v. *State*,
42 Tenn. 212 (1865) 4

United States v. *Bayaud*,
23 F. 721 (C.C.S.D.N.Y. 1883) 4

United States v. *Camarillo-Tello*,
236 F.3d 1024 (9th Cir. 2001) 17

United States v. *Cotton*,
535 U.S. 625 (2002) 15

United States v. *Dominguez-Benitez*,
542 U.S. 74 (2004) 15

United States v. *Gonzalez-Lopez*,
548 U.S. 140 (2006) 16, 17

United States v. *Olano*,
507 U.S. 725 (1993) ..... *passim*

United States v. *Ruiz*,
536 U.S. 622 (2002) 10

Vasquez v. *Hillery*,
474 U.S. 254 (1986) 17, 19, 21

Waller v. *Georgia*,
467 U.S. 39 (1984) 17

Young v. *United States ex rel. Vuitton et Fils S.A.*,
481 U.S. 787 (1987) 20

STATUTES:

18 U.S.C. § 3553(e) 8

FEDERAL RULES:

Fed. R. Crim. P. 11 9

Fed. R. Crim. P. 52 ..... *passim*

OTHER AUTHORITIES:

Albert W. Alschuler, *Plea Bargaining and Its History*, 13 Law & Soc'y Rev. 211 (1979) 4, 5

Michale D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. Rev. 159 (2008) 7

Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. Colo. L. Rev. 863 (2004) 8, 10

Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 Law & Soc'y Rev. 247 (1979) 4

Malcolm D. Holmes et al., *Plea Bargaining Policy & State District Court Caseloads: An Interrupted Time Series Analysis*, 26 Law & Soc'y Rev. 139 (1992) 6

John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 Law & Soc'y Rev. 261 (1979) 5

Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992) 6, 8, 9

Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79 (1988) 19

Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471 (1993) 10

Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 Int'l J. Psych. 117 (2000) 11

U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004* 7, 8

U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics for Fiscal Year 2007 6

Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409 (2003) 5

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,000 attorneys and nearly 40,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. NACDL submits this brief in the hope that it may aid the Court in its consideration of the fundamental constitutional and societal interests that are implicated when a prosecutor breaches a plea agreement that results in the conviction of a criminal defendant.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case implicates a criminal defendant's critical decision to relinquish fundamental constitutional rights, including the guaranteed right to a jury trial and the right against self-incrimination. The specific question before this Court is whether Rule 52(b)'s plain error standard of review applies when a prosecutor breaches a plea agreement that results in a defendant's conviction, but the breach is raised for the first time on appeal. To assist the Court in deciding this question, this brief first describes the extent to which prosecutorial breaches of plea agreements pose serious consequences for the criminal justice system. The brief then explains that application of the plain error standard demonstrates that breaches of plea agreements will *always* require reversal. Because application of the plain error standard would always lead to the same result, the Court should simplify matters by adopting a rule requiring automatic reversal whenever a prosecutor breaches a plea agreement, whether that error was raised at the district court or not.

Plea bargaining has long been a critical component of this country's criminal justice system. Guilty pleas now account for over ninety-five percent of federal convictions, thereby saving the government and society tremendous resources by significantly decreasing the number of trials, reducing the necessary personnel and infrastructure to handle those trials, and curtailing the costs of lengthy pretrial detainment. In exchange, defendants relinquish fundamental constitutional rights in the hope that the sentencing judge will adopt the negotiated recommendation of the prosecution. Plea

bargaining, however, only works when defendants trust those—the prosecutors—on the other side of the agreement. Thus, prosecutorial breaches of plea agreements that go unchecked threaten to undermine not only the plea bargaining system, but the entire criminal justice system.

Even if the Rule 52(b) plain error analysis in some sense applies, a holding in this case that prosecutorial breaches of plea agreements necessarily require reversal would ensure that prosecutorial breaches are minimized and that society's faith in the fair and efficient operation of the criminal justice system is maintained. A careful review of this Court's structural error cases demonstrates that certain fundamental constitutional errors are subject to correction regardless of prejudice. This Court has shown a willingness to exempt errors from a prejudice analysis when, *inter alia*, the effect of the error on the outcome of the proceeding is difficult to determine, when it is necessary to deter future similar errors, or when the error threatens the integrity of the legal system. These same rationales all apply to the issue before the Court in this case. Not only would it be difficult for a court to assess the prejudicial impact of a breached plea agreement on the outcome of the sentencing hearing, but such a holding would ensure that future prosecutorial breaches are deterred and the integrity of the criminal justice system is preserved.

ARGUMENT

I. Prosecutorial Breaches of Plea Agreements Undermine the Plea Bargaining Process and Pose Serious Consequences for the Criminal Justice System.

1. Consideration of the question presented requires an understanding of the key role of the plea bargaining process in the modern criminal justice system.

Plea bargaining has been a component of the criminal justice system since the late nineteenth century. Albert W. Alschuler, *Plea Bargaining and Its History*, 13 Law & Soc'y Rev. 211, 223 (1979); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 Law & Soc'y Rev. 247, 256 (1979) (noting that "plea bargaining in the literal sense is at least a century old"); see also, *e.g.*, *United States* v. *Bayaud*, 23 F. 721 (C.C.S.D.N.Y. 1883). Although some courts in the late nineteenth and early twentieth centuries denounced the practice of plea bargaining, "[t]he gap between judicial denunciations of plea bargaining and the behavior of many urban courts at the turn of the century and thereafter was apparently large." Alschuler, *supra*, at 227; see, *e.g.*, *People* v. *McCrory*, 41 Cal. 458, 462 (1871) (granting defendant leave to withdraw guilty plea when defendant pled guilty "mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated"); *Swang* v. *State*, 42 Tenn. 212, 213–14 (1865) (allowing defendant to withdraw guilty plea despite plea bargain because state constitutional

right to jury trial could not "be defeated by any deceit or device whatever").

By the late 1920s, "plea bargaining had become a central feature of the administration of justice." Alschuler, *supra*, at 232. A number of factors may have influenced the development and increased use of plea bargaining, including urbanization, increased crime rates, increased criminal caseloads, expansion of substantive criminal law, and the growing complexity of the trial process. See *id.* at 235–43; see also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 Law & Soc'y Rev. 261, 262 (1979) ("Over the intervening two centuries the rise of the adversary system and the related development of the law of evidence has caused [the] common law jury trial to undergo a profound transformation, robbing it of the wondrous efficiency that had characterized it for so many centuries."). Plea bargaining eventually became so prevalent in the criminal justice system that it was described by this Court in the 1970s as "inherent in the criminal law and its administration," *Brady* v. *United States*, 397 U.S. 742, 751 (1970), and "not only an essential part of the [criminal] process but a highly desirable part" of the criminal justice system, *Santobello* v. *New York*, 404 U.S. 257, 261 (1971).

The proportion of guilty pleas in the federal system has been moving steadily upward for over thirty years, and has seen dramatic increases in the past fifteen years. See Ronald Wright & Marc Miller, Comment, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409, 1415 (2003). In 2007, for example, nearly ninety-six percent of all charged federal offenses were resolved by guilty

pleas, and over 69,000 federal defendants pled guilty. See U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics for Fiscal Year 2007 at Fig. C and Table 10, *available at*: http://www.ussc.gov/annrpt/2007/sbtoc07.htm. In some federal district courts, close to ninety-nine percent of all criminal defendants pled guilty in 2007. See *id.* at Table 10. As one set of commentators has noted, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992) (emphasis in original).

Indeed, it is questionable whether the criminal justice system could function at all without plea bargaining. As this Court recognized over thirty-five years ago, if every criminal charge resulted in a trial, "the States and the Federal Government would need to multiply by many times the numbers of judges and court facilities." *Santobello*, 404 U.S. at 260; see also *Brady*, 397 U.S. at 752 ("scarce judicial and prosecutorial resources are conserved" when defendants plead guilty); Malcolm D. Holmes et al., *Plea Bargaining Policy & State District Court Caseloads: An Interrupted Time Series Analysis*, 26 Law & Soc. Rev. 139 (1992) (examining the effect of a plea bargaining ban in El Paso, Texas in 1975 and finding that after the implementation of the ban, the jury trial rate nearly tripled and the felony disposition rate substantially declined).

2. The reasons for the increasing and dominant role played by plea bargaining are not difficult to discern, as plea bargains offer advantages both to

society and to criminal defendants. From society's perspective, disposition after plea agreement

> leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial, it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261; see also Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. Rev. 159, 162 (2008) (observing that plea agreements often involve concessions in addition to the guilty plea, including a defendant's agreement to provide valuable information regarding the criminal conduct of co-defendants or other individuals).

From a defendant's perspective as well, plea bargains impart important benefits. Federal defendants who pled guilty during 2004 had their cases processed approximately 5.4 months faster than defendants who went to trial. See U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 2004*, at 60 & Fig. 4.2, *available at* http://www.ojp.usdoj.gov/bjs/abstract/cfjs04.htm. Defendants convicted by guilty pleas also typically receive better sentences than those convicted after trial. For example, in 2004, seventy-seven percent of offenders convicted by guilty plea received some prison time, compared to eighty-eight percent of defendants

convicted at trial. *Id.* at 70 & Fig. 5.3. Moreover, the average prison term for defendants who were convicted at trial in 2004 was almost three times longer (148.2 months on average) than the term imposed on defendants convicted after a guilty plea (56.2 months on average). *Id.*; see also Scott & Stuntz, *supra*, at 1915 (plea bargaining provides a way for "[c]riminal defendants, as a group, [to] reduce the risk of the imposition of maximum sanctions"); 18 U.S.C. § 3553(e) (allowing departures under the federal sentencing guidelines for criminal defendants who provide substantial assistance in the investigation or prosecution of another person who has committed an offense).

3. While plea bargaining affords advantages both to society and to a criminal defendant, the price of a plea bargain to the defendant is steep. The essence of plea bargaining is a prosecutor's promise to the defendant to make (or not make) certain sentencing recommendations to the judge, in exchange for the defendant foregoing his fundamental constitutional trial rights, such as the right against self incrimination, the right to confront one's accusers, and the right to a trial. See Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. Colo. L. Rev. 863, 886 (2004); see also *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (discussing rights waived by a guilty plea).

Given the fundamental constitutional rights afforded all criminal defendants, this Court has stressed the prosecutor's duty to refrain from unfair dealing in the prosecution of criminal defendants:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. *United States*, 295 U.S. 78, 88 (1935).

The obligation placed on a prosecutor to "play fair" is certainly understandable considering that prosecutors enter the plea bargaining process with several key advantages over defendants. As an initial matter, many plea agreements bind federal defendants to a particular outcome—a conviction—while the prosecution agrees only to recommend a particular sentence, which a judge is free to disregard. See Fed. R. Crim. P. 11(c)(1)(B), 11(c)(3)(B); see also *Santobello*, 404 U.S. at 262 (noting that there is "no absolute right to have a guilty plea accepted," and that "[a] court may reject a plea in exercise of sound judicial discretion"); Scott & Stuntz, *supra*, at 1954. Moreover, defendants enter the plea bargaining process as unwilling participants and must choose between a trial or a guilty plea,

both of which carry the possibility of punishment. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (holding that due process was not violated when state prosecutor carried out threat made during plea negotiations to re-indict defendant on more serious charges, and noting that plea bargaining process "presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Cook*, *supra*, at 908, 919.

Furthermore, in the vast majority of cases, a defendant is forced to make this difficult choice with significantly fewer financial and informational resources than the prosecutor. See *United States* v. *Ruiz*, 536 U.S. 622, 633 (2002) (prosecutor not required to disclose exculpatory impeachment material before entering a plea agreement with a federal criminal defendant); see also Cook, *supra*, at 907 & nn.188–89 (noting that among the federally convicted in 2000, almost 50 percent had less than a high school education, and more than 50 percent of federal criminal defendants had appointed counsel in 1997). Finally, as one commentator has argued, the current sentencing regime based on the offense charged gives the prosecutor enormous power to establish the parameters of plea bargaining by deciding how to charge a particular defendant in the first instance. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471, 1472–76 (1993). Thus, prosecutors may be encouraged to "over charge" a defendant in order to induce defendants to agree to a harsher plea than might otherwise be obtained. See *id.*

4. When one considers these key characteristics of the plea bargaining system, it becomes clear that there is more at stake than the fate of one criminal defendant when a prosecutor breaches a plea agreement. Whether or not a particular defendant can show prejudice in his case from the breached agreement, the acceptance of *any* breach will undermine the incentives for defendants—who are already at a disadvantage against the government—to place their trust in prosecutors to uphold their end of the bargain in exchange for the defendants' waivers of their constitutional rights. *Cf.* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 Int'l J. Psych. 117, 121–22 (2000) (concluding that most people, including criminal defendants, will view the outcome of a decision-making procedure as more fair if they have an opportunity to participate in the process and feel they can trust the authorities with whom they are negotiating). Should defendants—especially unrepresented defendants unschooled in the requirements of preserving issues for appellate review—come to believe that plea bargaining is a game of bait-and-switch filled with traps for the unwary, it would be unsurprising to find plea bargaining rates fall. This would be to the detriment of both society and defendants.

II. Whether Under the Plain Error Standard or Not, the Court Should Adopt a Rule Requiring Automatic Reversal for Breaches of Plea Agreements.

1. The law is clear that, where a prosecutor breaches a plea agreement and the defendant objects in a timely fashion, the sentence must be reversed without any consideration of prejudice. See

Santobello, 404 U.S. at 262–63.[2] In this case, however, defendant's counsel did not object to the breach of the plea agreement at the time of sentencing, and the question presented in this case is whether the "plain error" standard of Federal Rule of Criminal Procedure 52(b) should apply to the review of a breached plea agreement under such circumstances, or whether the breached plea agreement should instead be subject to *per se* reversal.

In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court explained how an appellate court should exercise its discretion to correct forfeited errors. The Court held that forfeited errors are subject to correction on appeal only if defendants show the following: (1) that there was an error in the district court proceeding; (2) that the error was "plain"; (3) that the error affected "substantial rights"—in other

---

[2] Subsequent decisions of this Court have reaffirmed *Santobello*'s holding that a prosecutor's breach of a plea agreement implicates important federal constitutional rights and requires automatic reversal. See, *e.g.*, *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984) ("[If] the defendant was not fairly apprised of its consequences * * * his plea [can] be challenged under the Due Process Clause. * * * [W]hen the prosecution breaches its promise * * *, the defendant pleads guilty on a false premise, and hence his conviction cannot stand * * *."); *Blackledge* v. *Allison*, 431 U.S. 63, 76 n.8 (1977) (if the prosecutor promised defendant a sentence that he did not receive, it would "raise[ ] the serious constitutional question whether his guilty plea was knowingly and voluntarily made") (citing *Santobello*, 404 U.S. 257); see also *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

words, was the defendant prejudiced; and (4) even assuming these first three requirements are satisfied, that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732–34 (internal quotations and citations omitted); see also *Johnson* v. *United States*, 520 U.S. 461, 466–67 (1997).

Applying this framework to the case of a breached plea agreement, *amicus* believes that there is no practical difference between adopting a *per se* rule requiring reversal and holding that the plain error standard applies. *Even if* Rule 52(b)'s plain error standard were to apply, the necessary outcome of applying the four-part test set forth by the Court in *Olano* must be reversal. Accordingly, this Court should simplify matters by holding that the plain error standard does not apply, and that breaches of plea agreements require *per se* reversal even if the error is not raised at the trial court.

2. It is conceded in this case that the prosecutor's breach of the plea agreement was an error and that the error was plain, thereby satisfying the first and second prongs of the *Olano* plain error analysis. Indeed, it is hard to imagine circumstances under which a material breach of a plea agreement would not satisfy these two threshold requirements. There can be no real dispute that, when a prosecutor reneges on specific promises made in a written plea agreement, that there has been an error, see *Olano*, 507 U.S. at 732–33 ("[d]eviation from a legal rule is 'error' unless the rule has been waived"), and that error is plain, see *id.* at 734 ("'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' * * * [T]he

error [must be] clear under current law.") (citations omitted).[3]

3. The Fifth Circuit concluded that Petitioner fell short of satisfying the third prong of the *Olano* test: whether the prosecutor's breach of the plea agreement prejudiced the defendant. In doing so, the Fifth Circuit erred. Under this Court's precedent, either there should be a presumption of prejudice when a plea agreement has been breached, or a reviewing court should not inquire into prejudice at all.

The *Olano* Court recognized circumstances under which a specific showing of prejudice may not be required: "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome * * *. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." 507 U.S. at 735. Thus, this Court's decision in *Olano* contemplated at least three categories of cases under a plain error analysis: (1) cases in which a showing of actual prejudice is required; (2) cases in which prejudice may be presumed; and (3) cases in which plain errors may be corrected regardless of prejudice. See *id.* at 734–35. In so doing, the *Olano* Court pointed to a prior decision discussing the types of errors that constitute "structural errors" in the harmless error context of Rule 52(a) and do not require proof of prejudice. See

---

[3] Although there may be some errors that are not "plain" to a judge who does not have a copy of a plea agreement or to a prosecutor who was not involved in the negotiation of the plea agreement, see Petitioner's Br. at 24–25, prosecutorial negligence should not be allowed to eliminate the plainness of the error.

id. at 735 (citing *Arizona* v. *Fulminante*, 499 U.S. 279, 306–10 (1991)).[4]

Decisions of this Court postdating *Olano* have likewise left open the possibility that there are situations in which defendants will not be required to demonstrate prejudice under a Rule 52(b) plain error analysis. Like *Olano*, those cases describe "structural errors" as errors for which no showing of prejudice may be required under Rule 52(b). See *United States* v. *Dominguez-Benitez*, 542 U.S. 74, 81 & n.6 (2004) (explaining that there are certain structural errors that "undermin[e] the fairness of a criminal proceeding as a whole" and therefore require reversal "without regard to the mistake's effect on the proceeding") (citing *Fulminante*, 499 U.S. at 309–10); *United States* v. *Cotton*, 535 U.S. 625, 632–33 (2002) (acknowledging, but not resolving, respondents' argument that in the plain error context an indictment error qualifies as a structural error that should be corrected regardless of its impact on the proceeding); *Johnson*, 520 U.S. at 468–69 (discussing, but not deciding, whether failure to submit an element of the offense to the jury was a "structural error" that necessarily affected substantial rights without a showing of prejudice).

---

[4] The harmless error rule applies to nonforfeited errors. Like the plain error rule set forth in Rule 52(b), however, the harmless error rule employs the phrase "affect substantial rights." See Fed. R. Crim. P. 52(a). Furthermore, as discussed *infra*, this Court has held that certain errors do not require proof of prejudice and therefore are not subject to the harmless error analysis. These cases are instructive on the type of errors that affect substantial rights under the plain error analysis without a showing of actual prejudice.

While the Court has frequently mentioned the possibility that there are exceptions for "structural errors" under Rule 52(b), it has never yet held in a case that such exceptions should be recognized. Nevertheless, this Court's Rule 52(a) jurisprudence (relied upon by *Olano*, 507 U.S. at 735) provides guidance as to when such an exception should be recognized.

First, this Court has held that errors may be structural, requiring no proof of prejudice, where the impact of the error is difficult to determine. In *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 152 (2006), for example, the Court held that a trial court's erroneous deprivation of a defendant's right to his choice of counsel qualified as a "structural error" not subject to review for harmlessness. The Court based its conclusion that the error was structural "upon the difficulty of assessing the effect of the error." *Id.* at 149 n.4. The Court reasoned that defense attorneys have widely varying styles and will pursue different strategies that will affect not only the trial, but whether a defendant decides to go to trial at all. Thus, an erroneous denial of a defendant's choice of counsel

> bears directly on the "framework within which the trial proceeds," * * * or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. * * * Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternative universe.

Id. at 150 (quoting *Fulminante*, 499 U.S. at 310). Other decisions of this Court have relied on similar reasons for requiring automatic reversal without any proof of prejudice. See, *e.g.*, *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (reversible error to deny defendant public trial because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, * * * we must presume that the process was impaired."); *id.* ("Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained.").

Like the fundamental errors at issue in *Gonzalez-Lopez*, *Waller* and *Vasquez*, the effect of a prosecutor's breach of a plea agreement on the outcome of the proceeding cannot easily be ascertained or quantified. While, to be sure, a plea agreement comes with no guarantees of a particular outcome, presumably millions of defendants over the years have entered into agreements requiring prosecutors to make (or not make) certain recommendations based on a belief that the prosecutor's recommendations could have some effect on the outcome. See, *e.g.*, *United States* v. *Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001) ("[W]hen the government agrees to recommend a certain sentence * * * the benefit to the defendant is that it presents a "united front" to the court. * * * [T]he chance that the court will follow the joint

recommendation is often the basis upon which defendants waive their constitutional right to trial.").[5]

Second, this Court has justified its categorization of certain errors as "structural" when automatic reversal was necessary to deter distasteful practices that offend the very principles on which the criminal justice system is based. As one set of commentators has explained:

> Deterrence becomes a relevant concern in two situations. First, when courts cannot effectively remedy the harm resulting from a particular type of constitutional error after the fact, they must attempt to minimize the occurrence of such errors. Only by deterring error in future cases can courts effectuate the values underlying constitutional rights falling into this category, such as fourth amendment rights and the fifth amendment privilege against self-incrimination.

---

[5] This case provides a good example of the uncertain effects of a breached plea agreement. The government promised Mr. Puckett that it would recommend a favorable adjustment under the sentencing guidelines for acceptance of responsibility. Because that promise was never fulfilled, it is impossible to assess what impact that recommendation might have had on the sentencing judge. Even though the district court noted at the sentencing hearing that credit for acceptance of responsibility would be "rare" when a defendant committed new crimes while awaiting sentencing, as Mr. Puckett did, we simply cannot know whether the government's recommendation might have led the district court to consider making Mr. Puckett's case one of those "rare" exceptions.

> Second, even when redoing the adjudicative process can repair the damage an error has already wrought, courts must use an overcompensatory sanction to prevent those errors that often escape detection.

Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 95 (1988).

For example, in *Vasquez*, the Court held that the exclusion of black jurors from the grand jury was reversible error not subject to the harmless error analysis because of the "overriding imperative to eliminate this systemic flaw in the charging process." 474 U.S. at 264; see also *id.* at 262 ("[I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass, * * * and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century * * * is not disproportionate to the evil that it seeks to deter."). Likewise, in *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936), the Court reversed a conviction based on an involuntary confession, without regard to whether defense counsel properly objected at trial, because "[t]he duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure."

So too here. If courts require defendants who have failed to object to a prosecutor's breach of a plea agreement in the district court to make a specific showing of prejudice, some prosecutor breaches will go unaddressed. Prosecutors may not see consequences of their broken promises, causing similar behavior among prosecutors to be encouraged rather than deterred. See Stacy & Dayton, *supra*, at 95–98 ("If prosecutors * * * feel they stand a

significant chance of escaping detection after committing constitutional error, they will likely conclude that the benefits from added convictions obtained with undetected constitutional violations outweigh the time, expense and embarrassment of the occasional reversal and retrial.").

Finally, this Court has held that the correction of errors is mandated, regardless of prejudice, when it is necessary to preserve the fairness and integrity of the criminal justice system. For example, in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, the Court held that the appointment of a biased prosecutor in a criminal contempt proceeding was a structural error that required reversal without regard to the facts of that case because such a practice "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." 481 U.S. 787, 811 (1987). The Court went on to explain that

> [a] concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. * * * Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Id. at 811–12; see also *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (exclusion of juror in capital case who was not committed to vote against death penalty was reversible error not subject to harmless-error review because the issue "is rooted in the constitutional right to an impartial jury" and the "impartiality of the adjudicator goes to the very integrity of the legal

system"); *Vasquez*, 474 U.S. at 262 (discrimination in grand jury selection "strikes at the fundamental values of our judicial system and our society as a whole") (internal quotation and citation omitted).

It almost goes without saying that a system in which prosecutorial breaches of plea agreements are accepted, because, *e.g.*, a *pro se* defendant failed to object and cannot prove elusive "prejudice" to an appeals court, will test the public's confidence in the fair and efficient administration of justice. As one state supreme court has observed when assessing a prosecutor's breach of a plea agreement, "[t]he state's integrity is at stake. It is less evil that [a defendant] may escape execution than that the state's integrity be compromised." *Commonwealth* v. *Reyes*, 764 S.W.2d 62, 66 (Ky. 1989). As stated by another state supreme court, a prosecutor's promise "is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond." *Bowers* v. *State*, 500 N.E.2d 203, 204 (Ind. 1986). Thus, the damage to public perceptions of the fairness and integrity of the criminal justice system from breached plea agreements is yet another reason not to require a showing of prejudice.

4. For this same reason each prosecutorial breach of a plea agreement will satisfy the fourth prong of *Olano*'s plain error analysis. Under that prong, defendants must show that the error in question "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (internal quotations and citations omitted). As discussed *supra*, a breached plea agreement irreparably damages the public's perception of the criminal justice system by

undermining the fundamental values on which that system is based. Accordingly, the "fairness, integrity or public reputation" of judicial proceedings is necessarily affected when prosecutors break the promises they make to criminal defendants in exchange for those defendants' waivers of their fundamental constitutional rights.

5. To summarize, it is uncontroversial that a conviction entered following a breach of plea agreement must be reversed if the defendant timely objected to that error. The only question before the Court is whether, where the objection was not raised in a timely fashion, the defendant must specifically show that the plain error standard of Rule 52(b) has been satisfied. The answer should be no. The breach of a plea agreement implicates each of the three grounds for automatic reversal found in this Court's structural error decisions: a specific showing of prejudice would be highly speculative, an automatic reversal rule is necessary to deter future breaches of plea agreements, and such a rule is necessary to maintain public confidence in the fairness and integrity of the criminal justice system. Therefore, even assuming that Rule 52(b) is the appropriate standard of review in this case, the result under such an analysis would be the same as a holding in this case that a breached plea agreement is exempt from Rule 52(b) and reversible *per se*—*i.e.*, the defendant's conviction cannot stand and must be reversed.

CONCLUSION

To the extent this Court finds that the plain error standard applies to a forfeited claim that the government breached a plea agreement, this Court should hold that such an error is always plain, affects substantial rights without proof of prejudice,

necessarily impacts the fairness and integrity of the criminal justice system, and therefore requires reversal of a defendant's conviction. Because this result is identical to the result sought by Petitioner—that any guilty plea conditioned on a false promise must be reversed—NACDL urges the Court to adopt a *per se* rule of reversal.

Respectfully submitted,

BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

KEVIN P. MARTIN
DAHLIA S. FETOUH
Counsel of Record
JODI B. KALAGHER
NATALIE F. LANGLOIS
GOODWIN PROCTER LLP
Exchange Place
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for Amicus Curiae

November 24, 2008

JOINT APPENDIX

111

(1)

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

No. 07-9712

IN THE

Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX VOLUME I

(Pages 1a-128a)

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorney for Petitioner

GREGORY G. GARRE
(*Counsel of Record*)
SOLICITOR GENERAL
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., NW
Washington, D.C. 20530
(202) 514-2217

Attorney for Respondent

[Additional Counsel Listed on Inside Front Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Petition for Certiorari Filed March 3, 2008
Certiorari Granted October 1, 2008

NEITHER 00500000046SB87

130

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

APPENDIX A

US Court of Appeals for the Fifth Circuit
Case Summary

Court of Appeals Docket #: 06-10543
Filed: 5/22/06
Nsuit: 0
USA v. Puckett
Appeal from: Northern District of Texas, Dallas

Lower court information:
District: 0539-3 : 3:02-CR-206-ALL
Ordering Judge: Barefoot Sanders,
US District Judge

10/23/07	Judgment entered and filed. [06-10543] (rmf)
11/6/07	Petition filed by Appellant James Benjamin Puckett for rehearing en banc. # of copies filed: 21 [5889202-1] Mandate pull date canceled. Date of COS: 11/5/07 Sufficient [Y/N]: Y [06-10543] (gmr)
11/8/07	Response/opposition requested by the Court to petition for rehearing en banc [5889202-1] by Appellant James Benjamin Puckett Response/Opposition due on 11/19/07. [06-10543] (ksw)
11/19/07	Response/opposition filed by Appellee USA to petition for rehearing en banc [5889202-1] by Appellant James Benjamin Puckett. Response/Opposition ddl satisfied. Date of COS: 11/16/07 Sufficient

	[Y/N]: Y [5898814-1] [06-10543] (mcs)
12/4/07	COURT Order filed denying petition for rehearing en banc [5889202-1] With poll (Y/N)?: N Mandate pull date is 12/11/07. Copies to all counsel. [06-10543] (gmr)
12/12/07	Mandate issued. Approved BOC Issued (Y/N)?: N [06-10543] Mandate pull date satisfied. (mkc)
12/14/07	Record on appeal returned to 5CCA. Volumes: 2 Supplemental Volumes: 1 SEALED: 1 env. [06-10543] Case Management ddl satisfied. (mkc)
12/17/07	Record on appeal returned to USDC. SEALED: 1 env (PSI) Electronic ROA Recycled:[Y/N] Y . [06-10543] (mkc)
3/11/08	Supreme Court notice that petition for certiorari was filed on 03/03/08 by Appellant James Benjamin Puckett. Supct No.: 07-9712 [06-10543] (cav)
10/7/08	Supreme Court order received granting petition certiorari [5979816-1] by Appellant James Benjamin Puckett on 10/01/08. [06-10543] (cav)
10/8/08	Record on appeal requested from the district court for the Supreme Court. [06-10543] (mkc)
10/8/08	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Vols: 1 [06-10543] (mkc)

APPENDIX B

U.S. District Court
Northern District of Texas (Dallas)
CRIMINAL DOCKET FOR CASE #:
3:02-cr-00206-K-1

Case title:
USA v. Puckett

Date Filed: 07/09/2002
Date Terminated:
05/04/2006

Assigned to: Judge Ed Kinkeade

Appeals court case number: 07-9712
US Supreme Court

Defendant (1)

James Benjamin Puckett
TERMINATED: 05/04/2006 represented by:

James Benjamin Puckett
BOP No 31845-048
USP Victorville
PO Box 5500
Adelanto, CA 92301
PRO SE

Lars R Isaacson
Lars Robert Isaacson Attrorney at Law
401 E
Corporate Dr.
Suite 100
Lewisville, TX 75057
469/948-4740
Fax: 972/346-500
Email: larsisaacson@criminaldefender.info

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Ira Raymond Kirkendoll
Federal Public Defender - Dallas
525 Griffin St.
Suite 629
Dallas, TX 75202
214/767-2746
Fax: 214/767-2886 FAX
Email: ira_kirkendoll@fd.org
TERMINATED: 05/24/2006
Designation: Public Defender or Community Defender Appointment

J Kem Carlson
Law Office of J Kem Carlson
Royal Central Tower
11300 N Central Expwy
Suite 300
Dallas, TX 75243
214/745-1212
Fax: 214/745-1262 FAX
Email: jkemcarlson@sbcglobal.net
TERMINATED: 05/24/2006
Designation: Retained

Jason D Hawkins
Federal Public Defender - Dallas
525 Griffin St
Suite 629
Dallas, TX 75202
214/767-2746
Fax: 214/767-2886 FAX
Email: jason_hawkins@fd.org
TERMINATED: 05/24/2006

William D Sims, Jr
Vinson & Elkins
2001 Ross Avenue
Suite 3700
Dallas, TX 75201
214/220-7703
Fax: 214/999-7703 FAX
Email: bsims@velaw.com
TERMINATED: 12/05/2002
Designation: CJA Appointment

Pending Counts	**Disposition**
18:2113A.F BANK ROBBERY WITH ASSAULT (1)	TWO HUNDRED-SIXTY TWO (262) Months with said terms to run consecutively to Count 2. 3 Years Supervised Release ;
18:924(c)(1) POSSESS AND BRANDISH A FIREARM (2)	EIGHTY -FOUR (84)Months with said terms to run consecutively to Count 1, for a Total Term of THREE HUNDRED-FORTY SIX (346) Months. These terms shall run concurrently with the terms imposed in Case Nos. 3:97-CR-093-H (01), 3:97- CR-175-H (01), and 3:97-CR-176-H (01). 3 Years Supervised Release to

run concurrently with Count 1; Total restitution in the Amount of $4,275.00; Total MSA $200.00 for both counts

Highest Offense Level (Opening)
Felony

Terminated Counts **Disposition**
None

Highest Offense Level (Terminated)
None

Complaints **Disposition**
None

Plaintiff represented by
USA

Jerri Lynn Sims
US Attorney's Office
1100 Commerce St
3rd Floor
Dallas, TX 75242
214/659-8671
Fax: 214/659-8803 FAX
Email: jerri.sims@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/09/2002	1	INDICTMENT as to James Benjamin Puckett (1) count(s) 1, 2 (3) (svc) (Entered: 07/ 10/2002)
07/19/2002		Initial appearance as to James Benjamin Puckett held Arraignment set for 9:30 8/1/02 for James Benjamin Puckett (Defendant informed of rights.) (jyg) (Entered: 07/22/2002)
07/19/2002	2	CJA 23 FINANCIAL AFFIDAVIT by James Benjamin Puckett (1) (jyg) (Entered: 07/22/2002)
07/19/2002	3	Minute entry as to James Benjamin Puckett : Initial Appearance held before Magistrate Judge Jeff Kaplan Court Reporter: Electronic (1) (jyg) (Entered: 07/22/2002)
07/22/2002	4	CJA 20 as to James Benjamin Puckett : Appointment of Attorney William 'Bill' D Sims Jr ; Attorney notified and Appointment Packet mailed. cc: all Page(s): 2 (Signed by

		Magistrate Judge Jeff Kaplan) (jyg) (Entered: 07/23/2002)
07/22/2002	5	CJA 20 as to James Benjamin Puckett : Appointment of Attorney William D Sims; Attorney notified and Appointment Packet mailed. cc: all Page(s): 1 (Signed by Magistrate Judge Jeff Kaplan) (jyg) (Entered: 07/24/2002)
07/30/2002	6	Notice of Arraignment as to James Benjamin Puckett set 9:30 8/1/02 before Judge Sanders. (1) (cxb) (Entered: 07/30/2002)
08/01/2002		Arraignment as to James Benjamin Puckett held (cxb) (Entered: 08/02/2002)
08/01/2002		PLEA of Not Guilty by James Benjamin Puckett (1) count(s) 1, 2 ; Court accepts plea. (cxb) (Entered: 08/02/2002)
08/01/2002	7	Minute entry as to James Benjamin Puckett; Arraignment held before Magistrate Judge Paul D. Stickney. Court Reporter: Linda Robbins. (1) (cxb)

		(Entered: 08/02/2002)
08/01/2002	8	PRETRIAL SCHEDULING ORDER as to James Benjamin Puckett setting Jury Trial for 9:00 on 9/23/02 for James Benjamin Puckett; Pretrial motions due by noon on 8/19/02 and govt's responses thereto by noon on 8/26/02; Pretrial Materials by noon on 9/9/02. cc: all Page(s): 1 (Signed by Senior Judge Barefoot Sanders) (cxb) (Entered: 08/02/2002)
08/19/2002	9	MOTION by James Benjamin Puckett of Continuance in Interests of Justice (3) (jyg) (Entered: 08/19/2002)
08/20/2002	10	ORDER as to James Benjamin Puckett granting [9-1] motion of Continuance in Interests of Justice Time Excluded from 9/24/02 to 1/13/03 as to James Benjamin Puckett (1). Case is scheduled for trial at 9am on 1/13/03. cc: all Page(s): 1 (Signed by Senior Judge Barefoot Sanders) (jyg) (Entered: 08/21/2002)
08/20/2002	11	PRETRIAL SCHEDULING ORDER as to James

		Benjamin Puckett setting Jury Trial for 9:00 1/13/03 for James Benjamin Puckett ; Motion Filing deadline on 12:00 11/4/02 ; Government Response to Pretrial Motions 12:00 11/12/02 Pretrial Materials 12:00 12/9/02 cc: all Page(s): 1 (Signed by Senior Judge Barefoot Sanders) (jyg) (Entered: 08/21/2002)
12/02/2002	12	MOTION with Memorandum in Support by James Benjamin Puckett requesting temporary reinstatement of institutional telephone privileges (10) (djd) (Entered: 12/03/2002)
12/03/2002	13	MOTION by James Benjamin Puckett of Continuance in Interests of Justice (3) (jyg) (Entered: 12/04/2002)
12/03/2002	14	ORDER OF REFERENCE: as to James Benjamin Puckett [12-1] motion requesting temporary reinstatement of institutional telephone privileges referred to Magistrate Judge Paul D. Stickney (Signed by Senior

		Judge Barefoot Sanders) cc: all Page(s): 1 (jyg) (Entered: 12/04/2002)
12/04/2002	15	ORDER as to James Benjamin Puckett granting [13-1] motion of Continuance in Interests of Justice Time Excluded from 1/14/03 to 4/7/03 as to James Benjamin Puckett (1) vacating [11-1] Scheduling order as to James Benjamin Puckett (1) reset Jury trial for 9:00 4/7/03 for James Benjamin Puckett cc: all Page(s): 1 (Signed by Senior Judge Barefoot Sanders) (jyg) (Entered: 12/04/2002)
12/05/2002	16	Entry/NOTICE of Appearance for James Benjamin Puckett by Attorney J Kemmer Carlson (1) (jyg) (Entered: 12/05/2002)
12/05/2002	17	MOTION by James Benjamin Puckett to substitute J Kem Carlson for William Sims (2) (jyg) (Entered: 12/05/2002)
12/05/2002	18	CERTIFICATE OF CONFERENCE by defendant James Benjamin Puckett Re: [17-1] motion to

		substitute J Kem Carlson for William Sims (2) (jyg) (Entered: 12/05/2002)
12/05/2002	19	ORDER as to James Benjamin Puckett reset scheduling order deadlines: Jury Trial for 9:00 4/7/03 for James Benjamin Puckett; Pretrial Materials 12:00 2/10/03 Government Response to Pretrial Motions 12:00 2/24/03 Motion Filing to 12:00 3/24/03; cc: all Page(s): 1 (Signed by Senior Judge Barefoot Sanders) (jyg) (Entered: 12/05/2002)
12/05/2002	20	ORDER as to James Benjamin Puckett granting [17-1] motion to substitute J Kem Carlson for William Sims ; Terminated attorney William 'Bill' D Sims for James Benjamin Puckett as to James Benjamin Puckett (1) cc: all Page(s): 1 (Signed by Senior Judge Barefoot Sanders) (jyg) (Entered: 12/05/2002)
12/19/2002	21	ORDER as to James Benjamin Puckett denying [12-1] motion requesting temporary reinstatement of institutional telephone

		privileges as to James Benjamin Puckett (1). The Court finds that the detention facility has not unreasonably restricted Defendant from communicating with his attorney. cc: all Page(s): 3 (Signed by Magistrate Judge Paul D. Stickney) (djd) (Entered: 12/20/2002)
02/04/2003	22	MOTION by James Benjamin Puckett of Continuance in Interests of Justice (3) (djd) (Entered: 02/05/2003)
02/06/2003	23	Letter to Judge Sanders by James Benjamin Puckett (19) (mcl) (Entered: 02/06/2003)
02/06/2003	24	ORDER as to James Benjamin Puckett granting [22-1] motion of Continuance in Interests of Justice Time Excluded from 4/7/03 to 7/7/03 as to James Benjamin Puckett (1) reset scheduling order deadlines: Jury Trial for 9:00 7/7/03 for James Benjamin Puckett; Pretrial Materials 12:00 6/23/03 cc: all Page(s): 2 (Signed by Senior Judge Barefoot Sanders) (djd) (Entered:

		02/07/2003)
05/29/2003	25	MOTION for Continuance by James Benjamin Puckett (kyg,) (Entered: 05/30/2003)
06/02/2003	26	ORDER granting 25 Motion to Continue trial until 10/6/03 at 9:am as to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on June 2, 2003) (kyg,) (Entered: 06/02/2003)
06/02/2003		Reset Hearings as to James Benjamin Puckett : Jury Trial set for 10/6/2003 09:00 AM before Barefoot Sanders. (kyg,) (Entered: 06/02/2003)
09/02/2003	27	ORDER as to James Benjamin Puckett : Rearraignment set for 9/4/2003 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on September 2, 2003) (kyg,) (Entered: 09/03/2003)
09/03/2003	28	PLEA AGREEMENT as to James Benjamin Puckett (kyg,) (Entered: 09/04/2003)
09/03/2003	29	Factual Resume as to James Benjamin Puckett (kyg,) (Entered: 09/04/2003)

09/04/2003	30	MOTION to Decrease Offense Level Pursuant to USSG Section 3E1.1(b). by USA as to James Benjamin Puckett (jyg,) Additional attachment(s) added on 9/5/2003 (kyg,). (Entered: 09/04/2003)
09/04/2003		Document Number Reset To 30 (kyg,) (Entered: 09/05/2003)
09/04/2003	31	Minute Entry for proceedings held before Judge Barefoot Sanders : Rearraignment Hearing as to James Benjamin Puckett not held on 9/4/03., Reset Hearings as to James Benjamin Puckett : Rearraignment reset for 9/18/2003 09:30 AM before Judge Barefoot Sanders. (Court Reporter Shawn McRoberts.) (kyg,) (Entered: 09/05/2003)
09/04/2003	32	ORDER as to James Benjamin Puckett. Rearraignment postponed to 9:30 am on 9/18/03. (Signed by Judge Barefoot Sanders on Sept 4, 2003) (kyg,) (Entered: 09/05/2003)
09/18/2003	33	Minute Entry for proceedings held before Judge Barefoot

		Sanders : Rearraignment Hearing as to James Benjamin Puckett held on 9/18/03. Plea entered by James Benjamin Puckett (1) Guilty Count 1,2. (Court Reporter Pam Wilson.) (kyg,) (Entered: 09/22/2003)
09/18/2003	34	Sentencing Scheduling Order as to James Benjamin Puckett : Presentence Investigation Report due by 10/23/2003. Objections to Presentence Investigation Report due by 11/6/2003. Presentence Investigation Addendum due by 11/20/2003. Objections to Presentence Investigation Addendum due by 12/4/2003. Sentencing set for 12/11/2003 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Sept 18, 2003) (kyg,) (Entered: 09/22/2003)
09/18/2003		Terminate Deadlines and Hearings as to James Benjamin Puckett : (kyg,) (Entered: 09/22/2003)
10/27/2003	35	REVISED Sentencing Scheduling Order as to James Benjamin Puckett :

		Presentence Investigation Report due by 10/30/2003. Objections to Presentence Investigation Report due by 11/13/2003. Presentence Investigation Addendum due by 12/4/2003. Objections to Presentence Investigation Addendum due by 12/11/2003. Sentencing set for 12/18/2003 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Oct 27, 2003) (kyg,) (Entered: 10/28/2003)
11/25/2003	36	MOTION to Continue Sentencing Hearing by James Benjamin Puckett (kyg,) (Entered: 11/26/2003)
11/26/2003	37	ORDER granting 36 Motion to Continue as to James Benjamin Puckett (1) Sentencing set for 2/12/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Nov 26, 2003) (jyg,) (Entered: 11/26/2003)
01/22/2004	38	MOTION to Continue Sentencing by James Benjamin Puckett (jyg,) (Entered: 01 /23/2004)

01/22/2004	39	ORDER granting 38 Motion to Continue as to James Benjamin Puckett (1) Sentencing reset for 3/18/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Jan 22, 2004) (jyg,) (Entered: 01 /23/2004)
03/02/2004	40	MOTION to Continue Sentencing by James Benjamin Puckett (jyg,) (Entered: 03/04/2004)
03/04/2004	41	ORDER granting 40 Motion to Continue as to James Benjamin Puckett (1) Sentencing reset for 4/29/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on March 4, 2004) (jyg,) (Entered: 03/04/2004)
04/13/2004	42	MOTION to Continue by James Benjamin Puckett (jyg,) (Entered: 04/14/2004)
04/13/2004	43	MOTION for Physical Evaluation and Neuropsychiatric Evaluation by James Benjamin Puckett (jyg,) (Entered: 04/14/2004)
04/14/2004	44	ORDER granting 42 Motion to Continue as to James

		Benjamin Puckett (1) Sentencing reset for 7/8/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on April 14, 2004) (jyg,) (Entered: 04/15/2004)
04/14/2004	45	ORDER granting 43 Motion for Physical Evaluation and Neuropsychiatric Evaluation as to James Benjamin Puckett. The Court orders the Federal Bureau of Prisons at FMC in Fort Worth, TX, to allow Gregory H Smith MD to conduct a physical evaluation and render a prognosis to the Court, dft's atty and AUSA. The Court further orders the Federal Bureau of Prisons at FMC in Fort Worth, TX, to conduct a neuropsychiatric examination to determine if dft is competent to be sentenced, etc. The Court further orders that a copy of said report be furnished to the Court, dft's atty and AUSA, prior to sentencing. (Signed by Judge Barefoot Sanders on April 14, 2004) (jyg,) (Entered: 04/15/2004)

05/25/2004	46	ORDER as to James Benjamin Puckett. Lead counsel in all cases pending before Judge Barefoot Sanders are strongly encouraged to register for electronic transmission of notice. The District Clerk's Office has discontinued fax noticing of docket activity, and notices are being sent through U.S. mail to those attorneys who have not registered for electronic noticing. For more information about how to register for electronic noticing, counsel should visit the Northern District of Texas website at http://www.txnd.uscourts.gov/records/ens.html (Signed by Judge Barefoot Sanders on May 25, 2004) (jyg,) (Entered: 05/26/2004)
06/15/2004	47	MOTION to Continue by James Benjamin Puckett (jyg,) (Entered: 06/16/2004)
06/16/2004	48	ORDER granting 47 Motion to Continue as to James Benjamin Puckett (1) Sentencing reset for 10/7/2004 09:30 AM before Judge Barefoot Sanders.

		(Signed by Judge Barefoot Sanders on June 16, 2004) (jyg,) (Entered: 06/16/2004)
07/07/2004	49	ORDER as to James Benjamin Puckett. The Clerk is directed to file the attached Federal Medical Center report under seal. Sealed document filed in 3:97cr93-H. (Signed by Judge Barefoot Sanders on July 7, 2004) (jyg,) (Entered: 07/09/2004)
09/16/2004	50	MOTION to Continue Sentencing by James Benjamin Puckett (jyg,) (Entered: 09/17/2004)
09/23/2004	51	ORDER granting in part 50 Motion to Continue as to James Benjamin Puckett (1) Sentencing reset for 10/21/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Sept 23, 2004) (jyg,) (Entered: 09/24/2004)
10/06/2004	54	MOTION to Continue by James Benjamin Puckett (jyg,) (Entered: 10/07/2004)
10/13/2004	55	ORDER granting 54 Motion to Continue Sentencing as to James Benjamin Puckett (1)

		Sentencing reset for 11/24/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Oct 13, 2004) (jyg,) (Entered: 10/14/2004)
11/12/2004	56	MOTION to Continue Sentencing by James Benjamin Puckett (jyg,) (Entered: 11/12/2004)
11/19/2004	57	Minute Entry for proceedings held before Judge Barefoot Sanders : Conference as to James Benjamin Puckett held on 11/19/04. (Court Reporter Joe Belton.) (jyg,) (Entered: 11/22/2004)
11/19/2004	58	ORDER as to James Benjamin Puckett : Sentencing reset for 12/9/2004 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Nov 19, 2004) (jyg,) (Entered: 11/22/2004)
11/29/2004	59	MOTION to Continue by James Benjamin Puckett (jyg,) (Entered: 12/01/2004)
11/30/2004	60	ORDER granting in part 59 Motion to Continue as to James Benjamin Puckett (1) Sentencing reset for 3/3/2005

		09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on Nov 30, 2004) (jyg,) (Entered: 12/02/2004)
12/09/2004	61	MOTION to Transport Defendant to Neurological Evaluation by James Benjamin Puckett (jyg,) (Entered: 12/09/2004)
12/09/2004	62	ORDER granting 61 Motion to Transport Defendant to Neurological Evaluation as to James Benjamin Puckett (1) for his scheduled appt on 12/13/04. (Signed by Judge Barefoot Sanders on Dec 9, 2004) (jyg,) (Entered: 12/09/2004)
02/07/2005	63	MOTION for access to telephone calls to attorney by James Benjamin Puckett (mfw,) (Entered: 02/08/2005)
02/08/2005	64	ORDER REFERRING MOTION to Judge Stickney as to James Benjamin Puckett 63 Motion for Miscellaneous Relief filed by James Benjamin Puckett. (Signed by Judge Barefoot Sanders on 2/8/05) (grj,) (Entered: 02/08/2005)

02/09/2005	65	ORDER denying 63 Motion for access to telephone calls to attorney as to James Benjamin Puckett (1) (Signed by Judge Paul D Stickney on 2/9/05) (grj,) (Entered: 02/09/2005)
02/14/2005	66	MOTION to Transport Defendant to Medical Evaluation Neuropsychological Evaluation and Neuropsychiatric Evaluation by James Benjamin Puckett. (lmr,) (Entered: 02/16/2005)
02/14/2005	67	MOTION for Continuance by James Benjamin Puckett. (lmr,) (Entered: 02/16/2005)
03/01/2005	68	ORDER granting in part 67 Motion to Continue as to James Benjamin Puckett (1) Sentencing reset for 3/10/2005 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on March 1, 2005) (jyg,) (Entered: 03/02/2005)
03/07/2005	69	ORDER as to James Benjamin Puckett: The Court is of the opinion that the 3/10/05, sentencing date should be, and it is hereby, vacated pending further

		orders of the Court. (Signed by Judge Barefoot Sanders on March 7, 2005) (jyg,) (Entered: 03/10/2005)
03/16/2005	70	MOTION TO TRANSPORT DEFENDANT TO NEUROLOGICAL EVALUATION by James Benjamin Puckett (vdf) (Entered: 03/18/2005)
05/06/2005	73	MOTION Requesting a Copy of All the Defendant's Neurological MRI and CT Scan Film by James Benjamin Puckett (jyg,) (Entered: 05/11/2005)
05/10/2005	74	ORDER Unfiling Pleading as to as to James Benjamin Puckett re 73 MOTION Requesting a Copy of All the Defendant's Neurological MRI and CT Scan Film due to the following deficiency: All motions should be filed by dft's counsel. Pleading returned to Mr. Puckett. (Signed by Judge Barefoot Sanders on May 10, 2005) (jyg,) (Entered: 05/11/2005)
05/26/2005	75	MOTION for Unrecorded Telephonic Contact with Defense Counsel by James Benjamin Puckett. (kdc,)

		(Entered: 05/31/2005)
06/01/2005	76	ORDER as to James Benjamin Puckett: Responses to MOTION for Unrecorded Telephonic Contact with Defense Counsel due by 6/15/2005 (Signed by Judge Barefoot Sanders on June 1, 2005) (jyg,) (Entered: 06/02/2005)
06/14/2005	77	RESPONSE to Motion by USA as to James Benjamin Puckett re 75 MOTION for Unrecorded Telephonic Contact with Defense Counsel (jyg,) (Entered: 06/15/2005)
06/15/2005	78	ORDER denying 75 Motion for Unrecorded Telephonic Contact with Defense Counsel as to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on June 15, 2005) (jyg,) (Entered: 06/15/2005)
08/18/2005	79	Vacation Letter as to James Benjamin Puckett by atty J Kem Carlson for dates Sept 1-Sept 12; Oct 13-17; Nov 18-27; and Dec 19, 2005 - Jan 6, 2006 (jyg,) (Entered: 08/19/2005)

09/27/2005	80	Claim of Ineffective Assistance of Counsel and MOTION for Evidentiary Hearing by James Benjamin Puckett (mfw,) (Entered: 09/27/2005)
09/27/2005	81	MOTION to Withdraw as Attorney of Record by J Kem Carlson by James Benjamin Puckett (jyg,) (Entered: 09/28/2005)
10/12/2005	82	ORDER as to James Benjamin Puckett: Before the Court is Defendant's Claim of Ineffective Assistance of Counsel, filed September 27, 2005. The Government is DIRECTED to file a Response no later than noon, November 14, 2005. (Signed by Judge Barefoot Sanders on 10/12/05) (rrj,) (Entered: 10/12/2005)
10/20/2005	83	Order Designating Case for ECF - see order for specifics. (Signed by Judge Barefoot Sanders on 10/20/05) (rrj,) (Entered: 10/20/2005)
11/08/2005	84	Pro Se MOTION to Permit Withdrawal of Plea by James Benjamin Puckett (jyg,)

		(Entered: 11/09/2005)
11/08/2005	85	AFFIDAVIT in Support by James Benjamin Puckett re: 84 MOTION to Permit Withdrawal of Plea filed by James Benjamin Puckett, (jyg,) (Entered: 11/09/2005)
11/10/2005	86	TRANSCRIPT of Rearraignment/Proceedings as to James Benjamin Puckett held on September 18, 2003 before Judge Barefoot Sanders. Court Reporter: Pamela J Wilson. (USC - not imaged) (jyg,) (Entered: 11/10/2005)
11/14/2005	87	MOTION to Seal Document by USA as to James Benjamin Puckett (jyg,) (Entered: 11/14/2005)
11/14/2005	88	ORDER granting 87 Motion to Seal Document as to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on November 14, 2005) (jyg,) (Entered: 11/14/2005)
11/14/2005	89	***SEALED*** (Attachments: # 1 # 2 # 3 # 4)(jyg,)Modified on 11/16/2006 (svc,). Modified on 5/28/2008 per order/doc. 145

		(tln). (Entered: 11/14/2005)
11/28/2005	90	Reply to Response to 80 Claim of Ineffective Assistance of Counsel. (bss,) (Entered: 11/28/2005)
03/20/2006	91	ORDER - The Government's Response of November 14, 2005, is ADOPTED as the Findings and Conclusions of the Court. Defendant's claim of ineffective assistance of counsel, and his motion to withdraw his plea of guilty, are DENIED. The Motion of Kem Carlson to Withdraw as Attorney of Record is similarly DENIED at this time.By separate Order, the Court will schedule this case for further proceedings. (Signed by Judge Barefoot Sanders on 3/20/06) (rrj,) (Entered: 03/20/2006)
03/20/2006	92	Sentencing Scheduling Order - Pursuant to the Court's Order of March 20, 2006, the Court establishes the following schedule: The Probation Office must disclose a supplemental addendum to the Presentence Report by or before 4:00 P.M., April 6,

		2006. Written objections to this addendum must be delivered to the Court and the Probation Officer by or before 4:00 P.M., April 13, 2006. Sentencing will be at 9:30 A.M., April 20, 2006. (Signed by Judge Barefoot Sanders on 3/20/06) (rrj,) (Entered: 03/20/2006)
03/30/2006	93	MOTION for Reconsideration by James Benjamin Puckett. (Exhibits A-F not imaged.) (bss,) (Entered: 03/30/2006)
03/31/2006	94	ORDER denying 93 Motion for Reconsideration as to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on 3/31/06) (rrj,) (Entered: 03/31/2006)
04/12/2006	95	MOTION to Continue by James Benjamin Puckett. (bss,) (Entered: 04/12/2006)
04/13/2006	96	ORDER granting 95 Motion to Continue as to James Benjamin Puckett (1) Sentencing set for 5/4/2006 09:30 AM before Judge Barefoot Sanders. (Signed by Judge Barefoot Sanders on 4/13/06) (rrj,) (Entered: 04/13/2006)

04/14/2006	97	MOTION to request tranfer of legal documents with defendant by James Benjamin Puckett. (bss,) (Entered: 04/14/2006)
04/18/2006	98	ORDER - Before the Court is Defendant's Pro Se Motion to Request Transfer of Legal Documents With Defendant, filed April 14, 2006. Defendant is scheduled for sentencing before the Court at 9:30 A.M., Thursday, May 4, 2006, not April 20, 2006, as stated in the Motion. The Government is requested to review this Motion and to file a response not later than noon, April 25, 2006. (Signed by Judge Barefoot Sanders on 4/18/06) (rrj,) (Entered: 04/ 18/2006)
04/19/2006		Notice of Docket Text/Document Modification by Deputy Clerk regarding Deleted docket entry #99 as to James Benjamin Puckett. Document receive stamped and forwarded to chambers. (bss,) (Entered: 04/19/2006)
04/19/2006	99	MOTION for Competency Hearing by James Benjamin Puckett (mfw,) (Entered:

		04/19/2006)
04/20/2006	100	ORDER - Before the Court is Defendant's Pro Se Motion for Competency Hearing, filed April 19, 2006. The Government is requested to review this Motion and to file a response not later than noon, April 25, 2006. (Signed by Judge Barefoot Sanders on 4/20/06) (rrj,) (Entered: 04/20/2006)
04/20/2006	101	Statement/Response as to James Benjamin Puckett by USA to 97 Motion/Request for tranfer of legal documents with defendant (Sims, Jerri) Modified on 4/20/2006 (kyg,). (Entered: 04/20/2006)
04/20/2006		Notice of Docket Text/Document Modification by Deputy Clerk regarding Statement/Response 101 as to James Benjamin Puckett by USA to 97 Motion/Request for transfer of legal documents (jyg,) (Entered: 04/20/2006)
04/26/2006	102	RESPONSE to Motion by USA as to James Benjamin Puckett re 99 MOTION for Hearing *on Competency*

		(Sims, Jerri) (Entered: 04/26/2006)
04/30/2006	103	Brief/Memorandum in Support by James Benjamin Puckett re 92 Scheduling Order - Sentencing, (Carlson, J) (Entered: 04/30/2006)
04/30/2006	104	Brief/Memorandum in Support by James Benjamin Puckett re 92 Scheduling Order - Sentencing, defendant's *motion for downward departure for extraordinary mental or emotional problems* (Carlson, J) (Entered: 04/30/2006)
5/01/2006	105	ORDER - Before the Court is Defendant Puckett's Pro Se Motion to Request Transfer of Legal Documents With Defendant, filed April 19, 2006. The Government does not oppose the Motion. While Defendant states that he is proceeding Pro Se, he is, in fact, represented by competent counsel. Defendant's counsel is directed to file a response to the Motion not later than noon, May 3, 2006. Sentencing proceedings are

		scheduled for 9:30 A.M., May 4, 2006. Copies of this Order shall be provided by the Clerk to Government counsel, to Defendant's counsel, to the U. S. Probation Office and to Defendant Puckett. (Signed by Judge Barefoot Sanders on 5/1/06) (rrj,) (Entered: 05/01/2006)
05/01/2006	106	ORDER - denying 99 Motion for Competency Hearing as to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on 5/1/06) (rrj,) (Entered: 05/01/2006)
05/02/2006	107	Proof of Service by James Benjamin Puckett of Subpoena re 105 Order to appear and/or produce documents on 5/4/06 at 9:00 a.m. (jyg,) (Entered: 05/02/2006)
05/02/2006	108	RESPONSE by James Benjamin Puckett re 105 Order, Set/Reset Motion and F&R Deadlines, (Carlson, J) (Entered: 05/02/2006)
05/04/2006		Minute Entry for proceedings held before Judge Barefoot Sanders : Sentencing held on 5/4/2006 for James Benjamin

		Puckett (1) - Count(s) 1 - TWO HUNDRED-SIXTY TWO (262) Months on Count 1. - Count(s) 2, EIGHTY - FOUR (84) Months on Count 2, with said terms to run consecutively, for a Total Term of THREE HUNDRED-FORTY SIX (346) Months. This term shall run concurrently with the terms imposed in Case Nos. 3:97-CR-093-H (01), 3:97-CR-175-H (01), and 3:97-CR-176-H (01). 3 Years Supervised Release; Restitution in the Amount of $4,275.00; MSA $200.00. Attorney Appearances: AUSA - Jerri Sims; Defense - J. Kem Carlson. (Court Reporter Pam Wilson.) (NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY). (rrj,) (Entered: 05/04/2006)
05/04/2006	109	MOTION to Withdraw as Attorney *of Record* by J. Kem Carlson by James Benjamin Puckett (Carlson, J) (Entered: 05/04/2006)
05/04/2006	110	JUDGMENT James Benjamin Puckett (1), Count(s) 1, TWO

		HUNDRED- SIXTY TWO (262) Months; 3 Years Supervised Release; Count(s) 2, EIGHTY -FOUR (84) Months with said terms to run consecutively to Count 1, for a Total Term of THREE HUNDRED-FORTY SIX (346) Months. These terms shall run concurrently with the terms imposed in Case Nos. 3:97-CR-093-H (01), 3:97-CR-175-H (01), and 3:97-CR-176-H (01). 3 Years Supervised Release to run concurrently with Count 1; Total restitution in the Amount of $4,275.00; Total MSA $200.00 for both counts (Signed by Judge Barefoot Sanders on May 4, 2006) (jyg,) (Entered: 05/05/2006)
05/08/2006	111	RESPONSE by USA as to James Benjamin Puckett re 109 MOTION to Withdraw as Attorney of Record by J. Kem Carlson (Sims, Jerri) (Entered: 05/08/2006)
05/10/2006	112	ORDER - Before the Court are Defendant Puckett's Pro Se Motion to Request Transfer of Legal Documents With Defendant, filed April 19, 2006; the Government's

		Statement, filed April 20, 2006; and Defendant's Counsel's Response, filed May 2, 2006. The Government and Defendant's counsel do not oppose the Motion. Defendant Puckett was sentenced in open court May 4, 2006, and Judgment and Commitment was entered May 4, 2006. The United States Marshal is directed to transfer the legal documents which Defendant requests to the institution to which he is designated at the time he is transferred to such institution or as soon as practical thereafter, and to notify the Court, the Office of the United States Attorney, the Defendant, and his counsel, when the transfer of the documents has been accomplished. Copies of this Order shall be provided by the Clerk to the United States Marshal, the U. S. Bureau of Prisons, Government's counsel, Defendant's counsel, the U. S. Probation Office in Dallas, and Defendant Puckett. (Signed by Judge Barefoot Sanders on 5/10/06) (rrj,)

		(Entered: 05/10/2006)
05/11/2006	113	NOTICE OF APPEAL by James Benjamin Puckett re 110 Judgment. No fee pd/TO Mailed (svc,) (Entered: 05/11/2006)
05/11/2006	114	Transmission of Notice of Appeal and Docket Sheet as to James Benjamin Puckett to US Court of Appeals re 113 Notice of Appeal - Final Judgment (svc,) (Entered: 05/11/2006)
05/11/2006	115	ORDER OF REFERENCE: Under authority of 28 U.S.C. Section 636(b) it is ORDERED that Defendant's Pro Se Notice of Appeal with Request for Appointment of Counsel on Appeal, filed May 11, 2006, in the above entitled action be, and it is hereby, referred to United States Magistrate Judge Paul D. Stickney for hearing, if necessary, and determination. (Signed by Judge Barefoot Sanders on 5/11/06) (rrj,) (Entered: 05/11/2006)
05/12/2006	116	MOTION for Stay by James Benjamin Puckett. (bss,)

		(Entered: 05/12/2006)
05/12/2006	117	MOTION to Appoint Counsel, Request to Proceed In Forma Pauperis by James Benjamin Puckett (svc,) (Entered: 05/12/2006)
05/12/2006	118	ORDER - Before the Court are Attorney J. Kem Carlson's Motion to Withdraw as Attorney of Record, filed May 4, 2006, and the Government's Response thereto, filed May 8, 2006. Also before the Court are Defendant's Pro Se Notice of Appeal, filed May 11, 2006, and Motion for Appointment of Counsel, Request to Proceed In Forma Pauperis, filed May 12, 2006. The Court has reviewed the above listed pleadings and is of the opinion that Attorney Carlson's Motion to Withdraw should be, and it is hereby, GRANTED. (Signed by Judge Barefoot Sanders on 5/12/06) (rrj,) (Entered: 05/12/2006)
05/12/2006	119	ORDER REFERRING MOTION to Judge Stickney as to James Benjamin

		Puckett 117 Motion to Appoint Counsel, Motion for Leave to Appeal In Forma Pauperis filed by James Benjamin Puckett, (Signed by Judge Barefoot Sanders on 5/12/06) (rrj,) (Entered: 05/12/2006)
05/12/2006	120	Letter to Judge as to Sentencing re 110 Judgment as to James Benjamin Puckett. (jyg,) (Entered: 05/15/2006)
05/15/2006	121	ORDER - Before the Court is Appellant-Movant' Pro Se Motion for Stay, filed May 12, 2006. Counsel for the Government is directed to file a response to this Motion by 4:00 P.M., May 17, 2006. (Signed by Judge Barefoot Sanders on 5/15/06) (rrj,) Modified on 5/15/2006 (rrj,). (Entered: 05/15/2006)
05/15/2006	122	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to James Benjamin Puckett. Ira Raymond Kirkendoll for James Benjamin Puckett appointed for appeal. (Signed by Judge Paul D Stickney on May 15, 2006) (jyg,)

		(Entered: 05/15/2006)
05/17/2006	123	RESPONSE by USA as to James Benjamin Puckett re 116 MOTION for Stay (Sims, Jerri) (Entered: 05/17/2006)
05/18/2006	124	ORDER - denying 116 Motion Stay as to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on 5/17/06) (rrj,) (Entered: 05/18/2006)
05/22/2006	125	NOTICE OF ATTORNEY APPEARANCE by Jason D Hawkins appearing for James Benjamin Puckett (Hawkins, Jason) (Entered: 05/22/2006)
05/22/2006	126	MOTION to Withdraw as Attorney by Jason D. Hawkins by James Benjamin Puckett (Hawkins, Jason) (Entered: 05/22/2006)
05/23/2006	127	ORDER REFERRING MOTION to Judge Stickney as to James Benjamin Puckett 126 Motion to Withdraw as Attorney filed by James Benjamin Puckett, (Signed by Judge Barefoot Sanders on 5/23/06) (rrj,) (Entered: 05/23/2006)

05/24/2006	128	ORDER granting 126 Motion to Withdraw as Attorney. Ira Raymond Kirkendoll and Jason D Hawkins withdrawn from case as to James Benjamin Puckett (1) (Signed by Judge Paul D Stickney on 5/24/06) (rrj,) (Entered: 05/26/2006)
05/25/2006	130	ORDER granting 117 Motion to Proceed In Forma Pauperis as to James Benjamin Puckett (1) (Signed by Judge Paul D Stickney on 5/25/06) (rrj,) (Entered: 05/26/2006)
05/26/2006	129	ORDER granting 117 Motion to Appoint Counsel Lars Robert Isaacson for appointed. as to James Benjamin Puckett (1) (Signed by Judge Paul D Stickney on 5/25/06) (rrj,) (Entered: 05/26/2006)
05/26/2006	131	MOTION to Appoint Counsel by James Benjamin Puckett (mfw,) (Entered: 05/26/2006)
06/21/2006		USCA Case Number as to James Benjamin Puckett 06-10543 for 113 Notice of Appeal - Final Judgment filed by James Benjamin Puckett,. (svc,) (Entered:

		06/21/2006)
08/02/2006	132	TRANSCRIPT REQUEST as to James Benjamin Puckett for proceedings held on 9/18/03 Rearraignment, 5/4/06 Sentencing before Judge Sanders, re 113 Notice of Appeal - Final Judgment. (svc,) (Entered: 08/03/2006)
09/11/2006	133	TRANSCRIPT filed as to James Benjamin Puckett for date of 9/18/03 Rearraignment Hearing before Judge Sanders, re 113 Notice of Appeal - Final Judgment. The Official Record of the transcript is on file with the Clerk's Office. Contact the Clerk's Office at 214/753-2200 or the Court Reporter - Pam Wilson at 214/753-2332 to obtain a copy of the Official Record. (jmr) Additional attachment(s) added on 10/2/2006 (rrj,). Modified on 10/2/2006 (rrj,). (Entered: 09/12/2006)
09/11/2006	134	TRANSCRIPT filed as to James Benjamin Puckett for date of 5/4/06 Sentencing Hearing before Judge Sanders, re 113 Notice of

		Appeal - Final Judgment. The Official Record of the transcript is on file with the Clerk's Office. Contact the Clerk's Office at 214/753-2200 or the Court Reporter - Pam Wilson at 214/753-2332 to obtain a copy of the Official Record. (jmr) Additional attachment(s) added on 10/2/2006 (rrj,). Modified on 10/2/2006 (rrj,). (Entered: 09/12/2006)
10/04/2006		Certified Record on Appeal as to James Benjamin Puckett to US Court of Appeals re 113 Notice of Appeal - Final Judgment consisting of 1 vol of electronic case papers; 2 transcripts and PSR (svc,) (Entered: 10/04/2006)
10/11/2006	135	***CJA 24 as to James Benjamin Puckett: Authorization to Pay Pamela Wilson $ 224.40 for Transcript, Voucher # 061006000028. (Signed by Judge Barefoot Sanders on 09/28/06) (lmr,) (Entered: 10/12/2006)
11/07/2006	136	MOTION requesting Judicial intervention in the

		acquisition of the appellate's right to posess his appeal documents by James Benjamin Puckett (mfw,) (Entered: 11/07/2006)
11/09/2006	137	ORDER - denying 136 Pro Se Motion Requesting Judicial Assistance to James Benjamin Puckett (1) (Signed by Judge Barefoot Sanders on 11/9/06) (rrj,) (Entered: 11/09/2006)
11/13/2006	138	MOTION to Unseal Document by James Benjamin Puckett (nap,) (Entered: 11/14/2006)
11/15/2006	139	ORDER - Before the Court is Defendants 138 Motion to Unseal, filed November 13, 2006. Unopposed by the Government, the motion is GRANTED. The Clerk is directed (1) to unseal the Governments Response to Defendants claim of Ineffective Assistance of Counsel, docket #89; (2) to provide a copy of the unsealed response to Defendants appellate counsel; and (3) to supplement the record on appeal to include the

		unsealed response. (Signed by Judge Barefoot Sanders on 11/15/06) (rrj,) (Entered: 11/15/2006)
11/16/2006		Certified Supplemental Record on Appeal as to James Benjamin Puckett to US Court of Appeals re 113 Notice of Appeal - Final Judgment consisting of 1 vol of case papers. (svc,) (Entered: 11/16/2006)
11/21/2006		Transmitted Record on Appeal as to James Benjamin Puckett to Lars Isaacson re 113 Notice of Appeal - Final Judgment consisting of 2 vols of electronic case papers; 2 transcripts and PSR (svc,) (Entered: 11/21/2006)
12/17/2007	141	Opinion of USCA (certified copy) in accordance with USCA judgment re 113 Notice of Appeal filed by James Benjamin Puckett. Judgment is affirmed. (jrb) (Entered: 12/18/2007)
12/17/2007	142	JUDGMENT of USCA (certified copy) as to James Benjamin Puckett re 113 Notice of Appeal. It is ordered and adjudged that

		the judgment of the District Court is affirmed. (jrb) (Entered: 12/18/2007)
12/19/2007	143	Appeal Record Returned as to James Benjamin Puckett: 1 envelope (PSR) re 113 Notice of Appeal. The electronic record has been destroyed. (npk) (Entered: 12/19/2007)
05/26/2008	144	MOTION to Seal Document filed by James Benjamin Puckett (Attachments: # 1 Text of Proposed Order) (Isaacson, Lars) (Entered: 05/26/2008)
05/27/2008		Defendant James Benjamin Puckett randomly Reassigned to Judge Ed Kinkeade; Judge Sanders is inactive. (caw) (Entered: 05/27/2008)
05/28/2008	145	ORDER granting 144 Motion to Seal Document as to James Benjamin Puckett (1). (Signed by Judge Ed Kinkeade on 5/28/2008) (axm) (Entered: 05/28/2008)
10/08/2008	146	Received letter from USCA5: The Supreme Court has GRANTED certiorari. (jmr) (Entered: 10/08/2008)

10/08/2008		US Supreme Court Case Number as to James Benjamin Puckett is 07-9712 for 113 Notice of Appeal filed by James Benjamin Puckett. (jmr) (Entered: 10/08/2008)
10/10/2008	147	Record on Appeal as to James Benjamin Puckett Transmitted to U. S. Supreme Court re 113 Notice of Appeal - US SC Number: 07-9712, USCA5 Number 06-10543. 1 vol. original documents, 3 vol. electronic record, 3 transcripts, 1 sealed folder and PSR (sealed). (jmr) Modified on 10/10/2008 (jmr). (Entered: 10/10/2008)
10/16/2008	148	SUPPLEMENTAL Record on Appeal as to James Benjamin Puckett Transmitted to U. S. Supreme Court re 113 Notice of Appeal - US Supreme Court Number: 07-9712 (06-10543). 1 original document retrieved from FRC. (jmr) (Entered: 10/16/2008)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	*	
v.	*	CRIMINAL NO. ___
JAMES BENJAMIN PUCKETT	*	**3-02CR0206-H**

INDICTMENT

The Grand Jury Charges:

COUNT 1

On or about April 4, 2002, in the Dallas Division of the Northern District of Texas, **JAMES BENJAMIN PUCKETT**, defendant, by force, violence and intimidation, did knowingly and intentionally take from the person and presence of an employee of Guaranty Bank, 1134 North Buckner Boulevard, Dallas, Texas, United States currency belonging to and in the care, custody, control, management and possession of Guaranty Bank, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and the defendant in committing the aforesaid act did

assault and did put in jeopardy the lives of employees and customers of Guaranty Bank by the use of a dangerous weapon, namely, a handgun.

In violation of Title 18, United States Code, Section 2113 (a) and (d).

COUNT 2

On or about April 4, 2002, in the Dallas Division of the Northern District of Texas, **JAMES BENJAMIN PUCKETT**, defendant, did knowingly use, carry, possess and brandish a firearm, to wit: a handgun, during and in relation to the commission of a crime of violence, namely: a bank robbery, a violation of Title 18, United States Code, Section 2113 (a) and (d), as alleged in Count 1 of this indictment, for which the defendant may be prosecuted in a Court of the United States.

In violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL

/s/ Judy Connolly
FOREPERSON

JANE J. BOYLE
United States Attorney

/s/ Jerri L. Sims
JERRI L. SIMS
Assistant United States Attorney
State Bar of Texas No. 18425300
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
(214) 659-8671

FILED: July 9, 2002.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	CRIMINAL NO.
v.	§	3:02-CR-206-H
	§	
	§	
JAMES BENJAMIN PUCKETT	§	

PLEA AGREEMENT

James Benjamin Puckett, the defendant herein, the defendant's attorney, J. Kern Carlson and the United States of America, agree as follows:

RIGHTS OF THE DEFENDANT

1. Defendant understands his rights:

   a. to be represented by an attorney;

   b. to plead not guilty;

   c. to have a trial by jury;

   d. to confront and cross-examine witnesses and to call witnesses in his defense; and

   e. against compelled self-incrimination.

WAIVER OF RIGHTS AND PLEA OF GUILTY

2. Defendant waives all these rights except to be represented by an attorney and pleads guilty to Counts One and Two of a two-count indictment charging violations of 18 U.S.C. § 2113(a) and (d), that being armed bank robbery and 18 U.S.C. § 924(c)(1)(A), that being using, carrying, possessing and brandishing a firearm in relation to the commission of a crime of violence.

SENTENCING

3. The maximum penalty allowed by statute that the Court can impose is:

a. imprisonment for a period not to exceed twenty-five (25) years for Count One and for Count Two, a period of not less than seven (7) years nor more than life to be served consecutively to the sentence imposed for Count One;

b. a fine not to exceed $500,000.00, or twice the pecuniary gain to Puckett or loss to the victim;

c. a mandatory term of supervised release of not more than five (5) years and not less than three (3) years must follow any term of imprisonment. If Puckett violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release;

d. a mandatory special assessment of two hundred dollars ($200.00); and

e. restitution pursuant to 18 U.S.C. § 3663A(c)(1), the Mandatory Restitution Act of 1996, is mandatory and must be ordered by the Court. Pursuant to 18 U.S.C. § 3663(a)(3), the defendant specifically agrees that the extent of restitution ordered by the Court may include the defendant's total offense conduct, and is not limited to the restitution attributable to the counts of conviction.

4. The sentence in this case will be imposed by the Court. Sentencing is pursuant to the Sentencing Reform Act of 1984, making the sentencing guidelines applicable. Puckett has reviewed the application of the guidelines with his attorney, but understands no one can predict with certainty what guideline range will be applicable in this case until after a pre-sentence investigation has been completed and the Court has ruled on the results of that investigation. Puckett will not be allowed to withdraw his plea if the applicable guideline range is higher than expected, or if the Court departs from the applicable guideline range.

DEFENDANT'S COOPERATION

5. Puckett shall cooperate with the government, by giving truthful and complete information and/or testimony concerning his participation in and knowledge of criminal activities. Puckett shall submit to a polygraph examination, if requested. The government shall advise the Court, via the Probation Department, of the extent of the defendant's cooperation.

6. Upon demand, Puckett shall submit a personal financial statement under oath and/or submit to interviews by the United States Attorney's Office regarding his capacity to satisfy any fines and/or restitution.

7. Prior to sentencing, Puckett agrees to tender a check to the government in the amount of two hundred dollars ($200.00) made payable to the United States District Clerk in satisfaction of the mandatory special assessment in this case. The government agrees to deposit the check with the United States District Clerk's office after sentencing.

GOVERNMENT'S AGREEMENT

8. The government agrees that Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level.

9. The government also agrees to request that Puckett's sentence be placed at the lowest end of the guideline level deemed applicable by the Court.

WAIVER OF RIGHT TO APPEAL SENTENCE

10. Puckett hereby expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742, and he further agrees not to contest his sentence in any post-conviction proceeding, including but not limited to a proceeding under 28 U.S.C. § 2255 (~~on. any ground including claims of ineffective assistance of counsel~~). Puckett, however, reserves the right to bring a direct appeal of a sentence exceeding the statutory maximum punishment, an upward departure, or an arithmetic error at sentencing, and

to challenge the voluntariness of his plea of guilty or this waiver.

FACTUAL RESUME

11. The Factual Resume in this case is true and correct and will be submitted to the Court as evidence.

12. Defendant has thoroughly reviewed all aspects of this case with his attorney and is fully satisfied with that attorney's legal representation.

REPRESENTATION OF COUNSEL

13. This plea of guilty is freely and voluntarily made and not the result of force or threats or of promises apart from those set forth in this plea agreement. There have been no representations or promises from anyone as to what sentence this Court will impose.

VIOLATION OF PLEA AGREEMENT

14. The defendant agrees that if he violates any provision of this Plea Agreement, the United States may declare this Plea Agreement null and void, and Puckett will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crimes or offenses contained in or related to the indictments filed in this case, as well as, perjury and obstruction of justice. In the event Puckett violates the plea agreement, he understands that any subsequent prosecution may be premised upon any information, statements or testimony provided by the him and that such information, statements or testimony, and all leads derived therefrom, may be used against him.

ENTIRETY OF AGREEMENT

15. This document is a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties.

AGREED TO AND SIGNED this 3rd day of ~~May~~ SEPTEMBER, 2003.

JANE J. BOYLE
United States Attorney

/s/ James Benjamin Puckett

JAMES BENJAMIN PUCKETT
Defendant

/s/ J.Kem Carlson, Jr.
J. KEM CARLSON, JR.
Attorney for Defendant

/s/ Jerri L. Sims
JERRI L. SIMS
Assistant United States Attorney
Texas Bar No. 18425300
110 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214.659.8671
Facsimile: 214.659.8804

SHANNON ROSS
Criminal Chief

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
v.	§	3-02-CR-206-H
	§	
JAMES BENJAMIN PUCKETT	§	

GOVERNMENT'S MOTION TO DECREASE OFFENSE LEVEL PURSUANT TO USSG § 3E1.1(b)

Pursuant to USSG § 3E1.1(b), the government formally moves this Court to decrease the defendant's offense level by one (1) additional level and states as follows:

1. The government agrees that the defendant has clearly demonstrated acceptance of responsibility for his offense pursuant to USSG § 3E1.1(a);

2. The defendant's offense level determined prior to operation of USSG § 3E1.1(a) is level 16 or greater; and

3. The defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial.

Therefore, the government respectfully requests the Court to decrease the defendant's offense level by one (1) additional level. However, the government reserves the right to withdraw this motion in the event the defendant engages in conduct inconsistent with his acceptance of responsibility.

Respectfully submitted,

/s/ Jerri L. Sims

JERRI L. SIMS
Assistant United States Attorney
110 Commerce Street,
3rd Floor
Dallas, Texas 75242
Telephone: 214.659.8671
Facsimile: 214.659.8803

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on counsel for the defendant on the 4th day of September, 2003.

/s/ Jerri L. Sims
JERRI L. SIMS

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	(	3:02-CR-206
VERSUS	(	DALLAS, T E X A S
JAMES BENJAMIN PUCKETT	(	SEPTEMBER 18, 2003

TRANSCRIPT OF REARRAIGNMENT
BEFORE THE HONORABLE BAREFOOT
SANDERS, UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: JERRI SIMS
Assistant United States Attorney
UNITED STATES DEPARTMENT OF JUSTICE
NORTHERN DISTRICT OF TEXAS
U.S. Courthouse, Room 300
1100 Commerce Street
Dallas, Texas 75242
214.659.8600

For the Defendant: J. KEM CARLSON
Attorney at Law
Royal Central Tower
11300 Central Expwy
Dallas, Texas 75243
214.745.1212

Proceedings reported by stenographic machine, Transcript produced by computer.

Court Reporter: Pamela J. Wilson, CSR
1100 Commerce, Room 1514
Dallas, Texas 75242
214.662.1557

PAMELA J. WILSON, C.S.R.,
U.S. DISTRICT COURT

[2]

P R O C E E D I N G S:

THE COURT: Now I'll turn to the re-arraignment docket the first case on that docket is 02-CR-206, United States versus James Benjamin Puckett.

Mr. Carlson, good morning.

MR. CARLSON: Good morning, Your Honor.

THE COURT: Are you ready to proceed?

MR. CARLSON: Yes, sir.

THE COURT: I note that the government is here, Ms. Sims is ready to proceed.

MS. SIMS: Yes, sir.

THE COURT: Now, are you Mr. James Benjamin Puckett?

THE DEFENDANT: Yes, sir.

THE COURT: And I understand you're represented here today by Mr. Carlson, as you have been; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: It's my understanding also that you're here to enter a plea of guilty to counts 1 and 2 of the pending indictment, one of which charges you with bank robbery and another which charges you with possession of a firearm during a crime of violence; is that your understanding?

[3]

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. And are you competent -- are you satisfied he's competent to proceed, Mr. Carlson?

MR. CARLSON: Yes, I am, Your Honor.

THE COURT: Hum?

MR. CARLSON: Yes, I am, Your Honor.

THE COURT: And are you satisfied that he understands what he's charged with?

MR. CARLSON: Yes.

THE COURT: Now, and I have plea agreement here, and subject to the plea agreement, which we'll address in a moment -- well, let me ask you first.

You want to have the indictment read? I'll do it either way.

THE DEFENDANT: We had it read last time, sir.

THE COURT: It's been read on a previous occasion?

THE DEFENDANT: Yes.

THE COURT: So do you want to waive it at this time?

THE DEFENDANT: That's fine. Yes, sir. I don't want to waste your time today, sir.

THE COURT: Is that all right with you, Mr. Carlson?

[4]

MR. CARLSON: Yes, sir.

THE COURT: Count 1 charges bank robbery, section 2113(a) and (d) and count 2 charges with carrying --brandishing a firearm, hence violation of 924(c)(1).

So how do you plead to these counts, guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: All right, sir. Now, sir, before I can accept that plea, Mr. Puckett, I need to ask you a few questions. While I'm asking you these questions you may talk at any time with Mr. Carlson. You understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Your answers to those questions must be given truthfully and under oath and if you should give me false answers you could be prosecuted for that. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right, sir. Please raise your right hand and take the oath.

JAMES BENJAMIN PUCKETT, DEFENDANT, SWORN

THE COURT: All right, sir. Now, how old are you, Mr. Puckett?

THE DEFENDANT: 41.

THE COURT: 41?

THE DEFENDANT: Yes, sir.

[5]

THE COURT: And how much education have you had?

THE DEFENDANT: Two years of college.

THE COURT: And prior to being taken into custody on this case were you employed?

THE DEFENDANT: Yes, Your Honor, I was.

THE COURT: What kind of work were you doing?

THE DEFENDANT: I own Celebrity Golfer Magazine, which was a national golf magazine.

THE COURT: All right, sir. Now, I have here a copy of a plea agreement. Have you got a copy there, Mr. Carlson? MR. CARLSON: Yes

THE COURT: I also have a -- prior to that a government motion to decrease offense level by a certain amount. Actually one level. Have you got a copy of that filed September 4? MR. CARLSON: Yes, I do, Your Honor

THE COURT: Do you need to be heard on that in any way, Ms. Sims?

MS. SIMS: Your Honor, I don't believe I do. The motion is should Mr. Puckett continue with his plea to allow him to have the third level off for acceptance of responsibility.

THE COURT: Then you agree to it?

MS. SIMS: At this time, yes, sir.

[6]

THE COURT: All right. Then I will accept it.

MR. CARLSON: Thank you, Your Honor.

THE COURT: Yes, sir.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Now then, with reference to the plea agreement, what I am looking at, Mr. Carlson, is a five page document, which is dated September 3. It's signed by Ms. Sims for the government. It's signed by you and by Mr. Carlson.

Do you have that in front of you?

MR. CARLSON: Yes, I do, Your Honor.

THE COURT: And did you see Mr. Puckett sign?

MR. CARLSON: Your Honor, I did not see Mr. Puckett sign, but -- so I think if you would just ask him, because he did sign it to my knowledge.

THE COURT: Did you sign this document, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor

THE COURT: All right, sir. And, Mr. Carlson, you signed it?

MR. CARLSON: Yes, sir, I did

THE COURT: And does that evidence your approval?

MR. CARLSON: Yes.

THE COURT: And, Mr. Puckett, do you agree with the plea agreement?

[7]

THE DEFENDANT: I do, as long as I can possibly appeal my ineffective assistance of previous counsel.

THE COURT: Well, I won't try to rule on that one way or the other at this time. I'm not asking you to waive any -- I don't think the plea agreement asks you to waive any rights of appeal with respect to that.

THE DEFENDANT: Okay.

THE COURT: I would not so interpret it. In fact, it strikes out any grounds of ineffective assistance of counsel. It's taken out. Is that right?

MR. CARLSON: Yes, sir. Yes, sir, that's right.

THE COURT: So other than that, do you have any questions about the plea agreement, Mr. Puckett?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you want the court to accept the plea agreement?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Would it be all right with you if I asked Ms. Sims to summarize the plea agreement, rather than reading it in its entirety?

THE DEFENDANT: Yes.

THE COURT: With the understanding that the written agreement will control. Is that okay, Mr. Puckett?

THE DEFENDANT: Yes, sir.

MR. CARLSON: Yes, sir.

[8]

THE COURT: Ms. Sims, let me ask you to get to the mic. I've got a stopped up ear this morning. I've got a lot of problem with it. Come on up and replace them.

MS. SIMS: May it please the court. Mr. Puckett understands he has those rights, he's waiving those rights as read to him here in the courtroom, he's pleading guilty to a two count indictment charging the offense of bank robbery and the offense of carrying a firearm in that crime.

The maximum penalty the court can impose is for imprisonment not to exceed 25 years for count 1. For count 2 the period is not less than 7 years, nor more than life, that must be served consecutively to any sentence the court imposes in count 1.

A fine not to exceed $500,000.

A mandatory term of supervised release of not more than 5 and not less than 3 years to follow any term of imprisonment.

Mandatory special assessment of $200.

And restitution as ordered by the court.

Mr. Puckett understands the sentence in this case will be imposed by the court, that that sentence will be pursuant to the sentencing guidelines.

Mr. Puckett agrees he's reviewed the application of the guidelines with his attorney, understands it can't be

[9]

predicted what guideline range will apply in this case until after the presentence report has been completed and the court has ruled on that report, and that he will not be allowed to withdraw his plea should his guideline range be higher than he expects or should the court depart from the guideline range.

The government agrees that Mr. Puckett has demonstrated acceptance of responsibility and thereby would qualify for a three leve reduction in his offense level.

The government also agrees to request that his sentence be placed at the lowest end of whatever guideline level the court deems to apply in this case.

Mr. Puckett does waive his right to appeal in some situations. He does expressly keep his right

to appeal any ground that includes any claim of ineffective assistance of counsel. He also reserves the right to appeal any sentence which exceeds the statutory maximum punishment, an upward departure, or any arithmetic errors at sentencing, and also to challenge the voluntariness of his plea of guilty or of this waiver.

He agrees that the factual resume is true and correct and will be submitted to this court as evidence, and agrees that his plea is freely and voluntarily made and that this written agreement contains the complete statement of the agreement between the parties in this case.

[10]

THE COURT: Thank you, Ms. Sims.

Mr. Carlson, does that appear to be a substantially correct summary of the written plea agreement?

MR. CARLSON: Yes, sir, it is correct.

THE COURT: Do you agree, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Let me ask you about two or three things in the agreement, Mr. Carlson. It provides that the defendant waives certain rights.

Did you talk with Mr. Puckett about the rights that he is waiving by entering a plea of guilty?

MR. CARLSON: Yes, sir, I did.

THE COURT: Is that right, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor.

THE COURT: It also mentions in there the fact that the guidelines will apply here. Did you -- without trying to say what they would be, did you and he talk about those guidelines?

MR. CARLSON: Yes, sir, we have.

THE COURT: It talks about also the limits on the -- the statutory limits. Did y'all talk about that?

MR. CARLSON: Yes, Your Honor.

THE COURT: Is that correct, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor.

THE COURT: There was a waiver and there is a

[11]

waiver of appeal provision. We've already addressed that. And there's one thing about ineffective assistance of previous counsel, which he reserves on.

THE DEFENDANT: Okay.

THE COURT: But did you and he talk about this provision?

MR. CARLSON: Yes, Your Honor, we have.

THE COURT: Is that correct, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right, sir. And you agree with it?

THE DEFENDANT: As long as I get to -- get that opportunity at some point in time.

THE COURT: Well, this does not limit that opportunity and I would not so construe it that way. You're talking about your previous counsel?

THE DEFENDANT: Correct. Not this counsel

THE COURT: Okay. Then let me ask you again. you want the court to accept this plea agreement, Mr. Puckett?

THE DEFENDANT: Please -- please, Your Honor

THE COURT: All right, sir. I have before me also, Mr. Carlson, a factual resume filed September 3. Have you got a copy there?

MR. CARLSON: Yes, sir, I do.

THE COURT: The first page and going into the

[12]

second page it sets forth the elements of the offense, first, of bank robbery, second, the elements of the gun count. Do you see those?

MR. CARLSON: Yes.

THE COURT: After reviewing the evidence -- the admissible evidence in the case are you satisfied that that evidence is sufficient to convict Mr. Puckett?

MR. CARLSON: Yes, Your Honor, I am.

THE COURT: That is, of the offenses charged in the indictment?

MR. CARLSON: Yes.

THE COURT: Then I'll ask that the government please read in, beginning on page 2, the factual statement here.

MS. SIMS: May it please the court.

On April the 4th, 2002, the defendant, James Benjamin Puckett, entered Guaranty Bank located at 1134 North Buckner Boulevard, Dallas, Texas, and approached employee teller Tamara Gilder and Kandy Novey at a teller station. Puckett placed a handwritten note on the counter. The note indicated that Puckett was robbing the bank and instructed the teller not to hit any alarms nor to give any trackers or dye packs. Puckett also displayed a chrome handgun and pointed the weapon at Ms. Nvey as she moved to assist Ms. Gilder. Ms. Gilder gave the defendant $4275.00 in United

[13]

States currency which was in her possession and under her care, custody, and management as a Guaranty Bank employee because of the threat of force and violence Puckett presented. Te defendant took the money and left the bank.

The deposits of Guaranty Bank were then insured by the Federal Deposit Insurance Corporation.

Subsequent to his arrest, Puckett orally admitted to committing this bank robbery.

THE COURT: Thank you, Ms. Sims.

Now, Mr. Carlson, did you go over with Mr. Puckett this factual statement?

MR. CARLSON: I have, Your Honor.

THE COURT: And did you see him sign?

MR. CARLSON: I did not see him sign, but I --it's my understanding he did sign.

THE COURT: And did you sign it, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And is it correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And I gather that your signature, Mr. Carlson, is evidence of your approval of the factual resume; is that right?

MR. CARLSON: Yes, sir

THE COURT: All right, sir. Mr. Carlson, are you satisfied that this is a voluntary plea of guilty to counts

[14]

1 and 2 of the indictment?

MR. CARLSON: Yes, I am.

THE COURT: And in your judgment is the plea voluntarily and understandingly made?

MR. CARLSON: Yes.

THE COURT: All right, sir. Then I will find that the plea entered here is intelligently entered, that it's voluntarily entered. I find also that the facts support the plea of guilty based on the colloquy here, the pleadings before the court and the factual resume.

And that being so, I accept the plea of guilty, and Mr. Puckett is convicted of the offense charged in counts 1 and 2 of the indictment.

The sentencing will be scheduled the first date for the PSR to be provided to you will be October 23.

MR. CARLSON: Yes, sir.

THE COURT: And thereafter certain other dates will come into play and they will be set forth in the scheduling order, which we will try to get out to you today or tomorrow.

MR. CARLSON: Yes, sir. Thank you very much.

THE COURT: Pending sentencing Mr. Puckett will remain in the custody of the marshal and is remanded at this time.

MR. CARLSON: Thank you, Your Honor.

[15]

THE COURT: You're welcome.

You're excused.

CERTIFICATION

I, PAMELA J. WILSON, CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 11th day of October, 2006.

PAMELA J. WILSON, CSR
Official Court Reporter
The Northern District of Texas
Dallas Division

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES	(	3:02-CR-206
OF AMERICA	(	
	(	
VERSUS	(	DALLAS, T E X A S
	(	
JAMES BENJAMIN	(	May 4, 2006
PUCKETT	(	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE BAREFOOT
SANDERS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: JERRI SIMS
Assistant United States
Attorney
UNITED STATES
DEPARTMENT OF
JUSTICE
NORTHERN DISTRICT
OF TEXAS
U.S. Courthouse, Room 300
1100 Commerce Street

Dallas, Texas 75242
214.659.8600

For the Defendant: J. KEM CARLSON
Attorney at Law
Royal Central Tower
11300 Central Expwy
Dallas, Texas 75243
214.745.1212

Proceedings reported by stenographic machine, Transcript produced by computer.

Court Reporter: Pamela J. Wilson, CSR
1100 Commerce, Room 1514
Dallas, Texas 75242
214.662.1557

PAMELA J. WILSON, C.S.R.,
U.S. DISTRICT COURT

P R O C E E D I N G S:

[2]

THE COURT: The court calls next for sentencing in the criminal number 02-CR-206, United States versus James Benjamin Puckett.

I note that Ms. Sims is here for the government and ready to proceed.

MS. SIMS: Yes, sir.

THE COURT: Mr. Carlson.

MR. CARLSON: Ready, Your Honor.

THE COURT: All right. All right. Now, if you'll come up here to the lectern, Mr. Puckett.

Come up with your lawyer, please.

You are Mr. James Benjamin Puckett; is that right?

THE DEFENDANT. Yes, Your Honor.

THE COURT: And your lawyer here is Mr. Carlson; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you're here for a sentencing this morning, you understand that?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: Previously sometime back you had pleaded guilty to counts 1 and 2 of the federal indictment. Count 1 charged you with bank robbery. Count 2 charged you with possession of a firearm during a crime of violence like bank robbery. You recall that?

[3]

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And I have the presentence report. It's obvious that Mr. Carlson has had it also and has reviewed it. It's also obvious to me at least that you've had it and have reviewed it yourself. Would that be correct?

THE DEFENDANT: Correct.

THE COURT: I have here, and I'll review them as we go forward, that there are certain objections filed.

THE DEFENDANT: Yes, sir, Your Honor.

MR. CARLSON: Yes, sir.

THE COURT: You filed some and then he filed on his own. You know, I don't really have to consider yours, but I will consider them.

THE DEFENDANT: I appreciate that, Your Honor.

THE COURT: We'll consider both of them and I'll address them momentarily.

As to where we are, what I'm looking at at this time, so we get a point of departure, is an offense level of 34 and a criminal history category of 6 on the career offender level. That provides for a commitment range of 262 to 327 months. However, the statutory maximum in count 1 is 300 months, and therefore that becomes the guideline range. So the imprisonment range is 262 to 300 months. And then the fine range comes along from there.

[4]

And then for count 2 there is a mandatory consecutive term; that is, it has to be imposed consecutively to any sentence previously imposed, and it's at least 7 years imprisonment, as I have it. And it's there that I'm starting.

Now, I'd like to proceed, as you would suggest, Mr. Carlson. I'll do it either way. Would you want to raise the objections at this point?

MR. CARLSON: Yes, sir. Just in regard to the -- the level -- and it's contained in my sentencing memorandum --

THE COURT: Yes.

MR. CARLSON: -- Mr. -- the -- the government filed a motion to allow Mr. Puckett to have acceptance of responsibility, and he did previously accept responsibility by entering a plea of guilty.

In addition to that, he has debriefed with a number of agents, at least four agents, in regard to other matters, and has consistently admitted his guilt and even assisted in this allegation that he committed a crime after he was incarcerated. So therefore, Your Honor, we would object to the level 34 and would ask the court to start at -- at level 31.

THE COURT: And I want to hear from the government on that and also from probation.

[5]

Ms. Sims.

MS. SIMS: Your Honor, on the acceptance of responsibility, that third level, which, of course, does not come into play unless the court finds that he should receive the downward -- the first two levels, that was made a long time ago. That was before the offense was committed that Ms. [HARBGS/] included in her presentence report and we would object to him receiving any acceptance of responsibility levels at this point.

THE COURT: Does probation have any comment on that?

THE PROBATION OFFICER: No, Your Honor. Just to reiterate what Ms. Sims said. The new offense according to the guideline level or the guideline manual prohibits any acceptance of responsibility.

THE COURT: Now, why did it prohibit it, because he committed another crime?

THE PROBATION OFFICER: That is correct, sir.

The defendant committed a new crime after entering his plea of guilty while awaiting sentencing in the instant offense.

THE COURT: All right.

MR. CARLSON: And, Your Honor, if I just might --

THE COURT: Sure.

MR. CARLSON: One other thing. This -- this

[6]

allegation has -- has not been proved beyond a reasonable doubt. He is not -- this is merely an allegation.

And originally the -- he would have started an offense level 31, so -- and we -- we believe that the court has discretion to -- to -- to give that downward departure for acceptance of responsibility.

THE COURT: I'm not sure how discretionary it is. But accepting what you say, I'd have to say it's so rare to be unknown around here where one has committed a crime subsequent to the crime for which they appear before the court and for them

even then to get the three points. Tentatively, I'm going to tell you I'm not going to do that.

However, I have a recommendation in here somewhere, I think, that I'll go to the lower end of the guidelines.

MR. CARLSON: Yes, sir. That's correct.

THE COURT: And I intend to follow that.

MR. CARLSON: Thank you, Your Honor.

THE DEFENDANT: Thank you.

THE COURT: So to clarify, it would be 262 to 300, or a level 34. And on the -- if I reduced, as you request, it would be somewhat different, it would be a level 31, 188 would be the minimum and I can -- and I think 235 -- I've got it here before me. I'm not there yet.

And then also -- and then as far as count 2

[7]

is concerned, you understand the mandatory --

MR. CARLSON: Yes, sir, we do.

THE COURT: -- nature of that.

So did you want to address your objections at this time?

MR. CARLSON: Yes, Your Honor.

The -- what I would like to do, with the court's permission, is to go ahead and let the court know who is here in support of Mr. Puckett. And we have one witness that would like to address the court.

THE COURT: Why don't we do that. That would be fine. Go ahead and call them.

MR. CARLSON: First of all, I'd like the court to take notice that Mr. Puckett's wife, Cindy Puckett, is here in the courtroom.

Would you stand, Ms. Puckett, please.

THE COURT: How do you do, Ms. Puckett?

Thank you for being here today.

MR. CARLSON: And -- and the court I believe already knows that Mr. and Ms. Puckett have been married for a -- for a lengthy period and have a daughter that is -- that is 12 years old.

THE DEFENDANT: She'll be 12 this month.

MR. CARLSON: Right. And Mr. -- Ms. Puckett lives with Jimmy Puckett's mother, who is now 84 years of age and

[8]

recently has had some health problems that -- which prohibited her from attending today, but she does continually support her son and -- and continues to communicate with me in regard to Mr. Puckett's case.

The second witness, Your Honor, that we would like to call to come forward is Eaton Reed (phonetic), who is the nurse at Mansfield who's been caring for Mr. Puckett.

THE COURT: Yes. That will be fine.

MR. CARLSON: Mr. Reed.

THE COURT: And would you stand there, please, sir, raise your right hand and be sworn.

(Witness sworn.)

THE COURT: All right, sir. Mr. Reed -- you can question him or do you want him to make a statement?

MR. CARLSON: I'd like to question him, Your Honor.

(DIRECT EXAMINATION)

BY MR. CARLSON:

Q. Would you state your name, please.

A. Eaton James Reed.

Q. And, Mr. Reed, what is your -- do you know -- do you know the defendant James Puckett?

A. Since he's been in our custody, yes.

Q. And how long is that?

A. He arrived the latter part of 2003.

[9]

THE COURT: Arrived where?

THE WITNESS: At Mansfield Law Enforcement Center, sir.

BY MR. CARLSON:

Q. And what is your position at Mansfield Law Enforcement Center?

A. I'm now the head nurse and a deputy marshal.

Q. And how long have you been in that position?

A. Deputy marshal since 1990 and a nurse since '97.

Q. All right. And when Mr. Puckett -- do you recall approximately when Mr. Puckett came under -- became under your care?

A. I believe it was September of '03 he was transferred from FCI Seagoville.

Q. And was that shortly before he entered a plea of guilty in this case?

A. I have no knowledge of that.

Q. All right. And you brought -- I asked you to bring the medical records that are kept at the Mansfield Law Enforcement Center; is that correct?

A. Yes, sir.

Q. And are you the custodian of those records?

A. Yes, I am.

Q. And you brought originals and copies of those records; is that correct?

[10]

A. Yes, sir.

Q. And you and I reviewed those records prior to your appearing today; is that right?

A. Yes, sir.

Q. And could you tell the court, when you received -- or when Mansfield received Mr. Puckett, what was his medical condition?

A. When he arrived we had a -- medical papers stating from FCI Seagoville that he had a history of migraine headaches of unknown origin.

Q. All right. And were any -- were any of the medical records -- did they indicate that he had a brain tumor?

A. Not at that time.

Q. All right. No records to your knowledge indicated that.

A. No, sir.

Q. And at that time did the records indicate that Mr. Puckett had any type of mental disorder?

A. No, sir.

Q. All right. Did you notice anything unusual when you were caring for Mr. Puckett?

A. Well, he --

Q. About his condition.

A. Numerous complaints daily about extreme migraine headaches.

[11]

Q. All right. Did he complain of any -- of having any seizures?

A. Yes, he did.

Q. And did you witness any of these seizures?

A. Not for a long time. I finally witnessed one.

Q. And when was that -- when did that seizure take place?

A. I believe -- I'd have to refer to my notes, sir.

Q. All right. If you don't mind taking a minute and --

A. The first time I witnessed the seizure was November 7th of '03, and at that time I was actually -- I believe I was administering medication to him and he had a seizure, went down, was totally incapacitated.

And I sent him out to Hughley Hospital to the emergency room and noted on there, you know, he had a history of migraine headaches. And the ER doctor ran a cat scan on him and determined he had a tennis ball-sized tumor, brain tumor.

Q. And was this -- this tumor was -- was invasive in nature?

A. Yes, it was. There were no outward appearance that he had a tumor.

Q. All right. And do the records reflect or do you have knowledge about how long that tumor was present in his skull?

A. Not that I'm aware of.

[12]

Q. All right. Do you have any training that would indicate that so that you might give an opinion?

A. I don't have any formal training, as being a neuronurse, the only -- is experience, you know, identifying seizure disorders in that, and he definitely had a seizure --

Q. All right.

A. -- that day, on November 7th.

Q. All right. And since that time, since the operation -- well, first of all, the operation -- it's true that

the operation for the tumor was December 24th, 2003; is that correct?

A. Yes. I was made aware of that after the fact. He was no longer in our custody when he had the surgery to remove the brain tumor.

Q. All right. And has -- as parts of his medical treatment has he had to have continued cat scans and MRIs to monitor where his surgery -- where the surgery took place?

A. Yes. I believe the neurosurgeon has noted that he needs a cat scan within six months post-op and yearly after that.

Q. And why do you -- based on your training and experience do you know why it is that he has to continue to have those checks?

A. Best of my knowledge, in looking over the doctor's

[13]

notes, that they did not remove a hundred percent of the tumor, so there may be some residual there that could have the potential to grow back.

Q. All right. And do you know what the statistics are in terms of that type of tumor and whether or not it does grow back?

A. I believe there's about a 50/50 chance it can grow back. How long that takes, I have no idea.

Q. And is that -- is that opinion consistent with the medical records that you brought today?

A. Yes. I believe so.

Q. And have you been caring for Mr. Puckett since his surgery?

A. Since his surgery he was at FMC Fort Worth is where he was transferred and they did the surgery, and we received him back at Mansfield Law Enforcement Center I believe July of '04 he come back in our custody through the U.S. Marshals.

Q. And you've cared for him since that time; is that correct?

A. Yes.

Q. And what -- have you noticed any residual symptoms of this tumor?

A. He still takes daily medication for seizure disorders.

He takes pain medication for continual headaches. He

[14]

complains of blurred vision, at times decreased hearing. He's had appointments with John Peter Smith Hospital, the outclinic?

Q. And has -- have you noticed -- have you actually personally witnessed any seizures that he has had?

A. I haven't witnessed any since his surgery, no. He has complained that he has had some. I don't know that any staff has witnessed them.

Q. Okay. Have you noticed any irregularities in his gait?

A. Yes.

Q. And would you describe those to the court, please?

A. At different times when he gets up to have his medication he can have unsteady gait. He usually favors the right, I believe.

Some of his hand/eye coordination is a little off at times. He has trouble with his memory. He keeps a lot of records, notes.

Q. Is this consistent with the type of tumor he had and the surgery that he had?

A. It's consistent as far as his motor skills. I don't know if it's related to the tumor itself or just the actual trauma caused by the removal of the tumor.

MR. CARLSON: Your Honor, that's all I have of this witness.

THE COURT: Ms. Sims, did you want to ask any

[15]

questions?

MS. SIMS: Could I ask just a couple, judge?

THE COURT: Yes.

(CROSS-EXAMINATION)

BY MS. SIMS:

Q. Mr. Reed -- doctor -- you're not a medical doctor; is that correct?

A. No, ma'am. I'm a nurse.

Q. And I'm assuming that when you observed the first seizure that Mr. Puckett had back in -- November of 2003, did you say?

A. Yes.

Q. At that point you were unable to communicate with him and it would be obvious to anyone around that he was having a seizure?

A. Yes.

Q. The same type of seizure, like an epileptic, same type of thing?

A. Yeah. There's different degrees.

Q. So at that point would he be totally incapacitated?

A. Yes.

Q. If he were to have a seizure like that in the courtroom we would all know it?

A. Yes.

Q. You've had numerous opportunities to communicate and

[16]

converse with Mr. Puckett, would that be a fair statement?

A. Daily.

Q. Have you ever -- does he have any trouble communicating with you about his medical situation, his symptoms, his ailments, his need to see --

A. No. He usually describes everything very well.

Q. And doesn't have any problem with his memory; is that correct?

You don't have a problem with him self-reporting his medical situation, do you?

A. No.

Q. Legally have you had any discussions with him about his legal situation?

A. No.

Q. Do you think -- has he had trouble communicating with you about factual situations, family history, anything like that?

A. Not that I'm aware of.

Q. Ever -- ever had any reason to refer him on to a psychiatrist or anyone for any psychiatric treatment that you thought that he was incompetent, unable to express himself or -- or was unable to take care of himself?

A. As far as I'm aware he's had no recommendation for a psych evaluation while he's been in our care.

Q. And you haven't felt the need to do that?

[17]

A. No, ma'am.

Q. To refer him for anything like that?

A. No.

Q. For nothing he's exhibited to you?

A. No.

MS. SIMS: That's all I have, Your Honor.

THE COURT: Does probation have anything?

THE PROBATION OFFICER: No, sir.

THE COURT: Do you have anything further?

MR. CARLSON: Not of this witness.

MS. SIMS: May this witness be excused, Your Honor?

THE COURT: Shall he be excused?

It's okay with me.

Mr. Reed, if you will hold on just a minute, I'll see about it.

MR. CARLSON: Judge, I just have one other question that I forgot -- that I'd like to ask Mr. Reed, if I could.

THE COURT: All right. Mr. Reed, if you will come back up for one other question.

(REDIRECT EXAMINATION)

BY MR. CARLSON:

Q. Mr. Reed, --

THE COURT: You're still under the same oath, Mr. Reed.

[18]

THE WITNESS: Yes, sir.

BY MR. CARLSON:

Q. Mr. Reed, did you notice any difference in his mental condition prior to the surgery and then after the surgery?

A. Such as?

Q. Such as inability to communicate, unusual actions, anything that would lead you to believe that he was not normal mentally?

A. No. He communicates very well in writing and speaking.

Q. And that was true prior to the -- prior to the surgery?

A. Yes, sir.

Q. All right. All right.

MR. CARLSON: That's the only other question I have, Your Honor.

THE COURT: Anything else, Ms. Sims?

MS. SIMS: No, sir.

THE COURT: Shall he be excused?

MR. CARLSON: Yes, sir.

THE COURT: All right. Then you're free to go, Mr. Reed. And thank you for your time.

THE WITNESS: Yes, sir. Thank you.

THE COURT: Now then, you have any other witnesses?

[19]

That's it?

MR. CARLSON: No other witnesses, Your Honor.

THE COURT: Okay. Well, let's talk a little bit about your objections to the presentence report. I'll talk about his, ones he's filed on behalf of himself.

Bear with me just a minute, Mr. Carlson.

MR. CARLSON: Yes, sir.

THE COURT: You have objected to paragraphs 26 and 26-A of the presentence report because of the three level decrease that you asked for.

MR. CARLSON: Yes, sir. Yes, sir. That's correct.

THE COURT: And that if I grant that it would take you down to a level 31.

You have several parts that I will accept for the same reasons that the probation department did.

On paragraphs 108-A and 108-B --

MR. CARLSON: That's correct, Your Honor.

THE COURT: -- the probation officer had four objections to that, objecting to paragraph 78. You object to the date of arrest being wrongly shown. I accept that for the reasons stated by probation.

Objection to paragraph 106, he objected to his daughter's birthday. The correct day was May 19, 1994. I accept that.

[20]

Next paragraph, 105, date of marriage to Chris Gilpin, was in 1986. I accept that. And the date of divorce was in March of 1998. I accept that.

Next, as to --

MR. CARLSON: Judge, just for your -- the objection I believe was the divorce actually took place in 1988.

THE COURT: 1988.

THE DEFENDANT: Yes, sir.

MR. CARLSON: Yes, sir.

THE COURT: All right. Well, there's enough paper here, it's no wonder that there are a few wrong.

MR. CARLSON: Yes, Your Honor.

THE COURT: Objection to paragraph 115, you objected to the reference that he had not completed all 24 classes of the First Step program. The defendant's -- probation's comment is that his attendance was inconsistent.

THE DEFENDANT: Well, Your Honor, if I --

THE COURT: Go ahead.

THE DEFENDANT: Go ahead?

THE COURT: You want to say something about that?

THE DEFENDANT: Yes, sir. Actually, I did.

THE COURT: You did complete it?

[21]

THE DEFENDANT: The class was four times a week, and you had to sign-in every day when you went to class. I missed a snow day, but I made that snow day up. I believe if somebody will look at the records of attendance, that I attended 24 classes.

THE COURT: Well, they came up with a different answer, but I'll tell you, I'll go ahead and accept your objection. It doesn't -- will not make any difference on the sentence.

THE DEFENDANT: Appreciate it.

Thank you, Your Honor.

THE COURT: Now, as to paragraph 26-B, and your talking to Mr. Hames about a scheme to defraud, probation says that the defendant, that is you, admitted to probation officer that you did tell her about what you told Mr. Hames about the scheme.

Do you have anything you'd like to say about that?

MR. CARLSON: Your Honor, just the same objections that we've already been over.

THE COURT: Okay. Then I'll overrule that objection.

And paragraph 108-A, objected according to Dr. Mills the brain tumor that was removed was not invasive. But according to what the probation officer found in the medical records the tumor was invasive and the brain tumor was

[22]

dissected. The government does not claim to have any medical evidence that can contradict this claim of a prearrest diagnosis of a brain tumor, but Dr. Mills' assumptions cannot be substantiated without factual medical records.

According to Mr. Puckett he notified the medical staff at Seagoville in May 2002 of his pretrial prearrest diagnosis of brain tumor.

The probation office information is to the contrary. What did you have on that, from probation?

THE PROBATION OFFICER: Your Honor, as -- as I stated in the supplemental addendum to the

presentence report, dated April 6th, 2006, the medical records provided by the Fort Worth medical -- or federal medical center and Mansfield Law Enforcement Center in Dr. John Mills' report the tumor was not invasive in nature, which grew in addition to and not substantially altering already existing brain tissue.

Dr. Mills' report concluded that optic nerve damage was secondary to the growth of this tumor. Per Dr. Mills' report a review of the medical records suggests the tumor was not present as late as 2002, as no evidence of cortical abnormality was noted in 2002 cat scan.

THE COURT: All right. Well, I don't see that it really makes any difference here, do you?

[23]

MR. CARLSON: Judge, it's just our contention that those -- the medical records have not been consistently examined for the purpose of this -- of the -- of the addendum or the presentence report and it's Mr. Puckett's contention, and it's also the testimony of Mr. Reed, that the brain tumor was invasive and that it was reported as early as approximately two months after his arrest by Mr. Puckett.

Dr. Frank's evaluation, when she did the evaluation, noted that -- from the records that that's when the -- a brain tumor was reported.

THE COURT: It was also -- Randall Rattan --

MR. CARLSON: Rattan, yes, sir.

THE COURT: As the evaluator, she also stated that he indicated an understanding of the plea bargaining process, and he stated at that time he did not want to set aside his guilty plea. Is that correct?

From probation?

THE PROBATION OFFICER: I'm sorry, Your Honor?

THE COURT: He stated to Mr. Rattan that he did not want to set aside his guilty plea?

THE PROBATION OFFICER: That is correct, Your Honor.

THE COURT: And that would have been when?

THE PROBATION OFFICER: I believe it was June -

[24]

the report -- the date of the report was --

THE COURT: June 25, '04 is the date that I have of the evaluation.

MR. CARLSON: That's correct, Your Honor.

THE PROBATION OFFICER: That's correct.

THE COURT: And she stated --

MR. CARLSON: He, Your Honor. Dr. Rattan.

THE COURT: It may well be her word against his then.

MR. CARLSON: Two different -- two different evaluations. Right.

THE PROBATION OFFICER: Your Honor, if I may respond to Mr. Carlson's remark on Dr. Frank's

comment in her evaluation, what it says in her evaluation, and I will read it from -- from the evaluation, "Documentation of Mr. Puckett's report of possible brain tumor began on June 12th, 2002, coincident with his complaints of a left frontal parietal headache with a pain severity of 8 on a 1 to 10 scale." That -- that sentence can be just subject to interpretation. Is it Mr. Puckett's report of a possible brain tumor or the medical staff's report of a possible brain tumor.

I have not found the documentation from the Mansfield Law Enforcement Center that says there is a possible brain tumor or from the federal -- from Seagoville saying there's

[25]

a possible brain tumor.

She goes on to say later in the same paragraph that a cat scan performed on September 10th, 2002, was reported as normal.

THE COURT: Yes. And as I have it, reading from a copy of the report I think must be the same as you have, later on she says Mr. Puckett stated he was not interested in setting aside his plea.

THE PROBATION OFFICER: That is a different report. That's Dr. Rattan's report. This is the neuropsychologist, I believe -- neuropsychiatrist, Dr. Susan Franks.

THE COURT: Okay.

THE PROBATION OFFICER: It's the one that Mr. Carlson was just referring to about a tumor being present as early as June 2002, based on this --

THE COURT: You've been through all of these records, I take it?

THE PROBATION OFFICER: That's correct, Your Honor.

THE COURT: Have you found any evidence at all that -- that the -- there was anything that incapacitated him, made him incompetent at the time he entered his plea?

THE PROBATION OFFICER: I have not, Your Honor.

I have not found any medical evidence, but I am not a

[26]

medical doctor.

THE COURT: I know that.

THE PROBATION OFFICER: I can't interpret the medical interpretations here.

Dr. Franks' comment here on the documentation, I have found documentation that he has reported headaches but I have not found any documentation that there was a diagnosis of a tumor at that time.

THE COURT: Anything -- as I understand it -- have you found anything in any of the evidence that you looked at, any of these records, that indicated to you, as a reader, not as a medical person, but as a probation officer experienced in the field, that he wanted to withdraw his plea of guilty?

THE PROBATION OFFICER: No. On the contrary, he told Dr. Rattan he was not -- it was not his intent to withdraw his plea.

THE COURT: Okay. Thank you.

Yes, sir. Mr. Puckett.

THE DEFENDANT: Your Honor -- Your Honor, I have medical records from FDC Seagoville that document symptoms from a brain tumor May 16th, 2002. I notified the medical staff at Seagoville that I had a previous diagnosis of a brain tumor in Monterrey, Mexico. Dr. Birdsong was provided the medical records from that scan in Monterrey, Mexico.

[27]

The medical records at FDC Seagoville refer to a brain tumor history 41 times. And I have those records here, if you'd like to look at them. The symptoms of the brain tumor are documented for 18 months.

THE COURT: And does it affect your competence?

THE DEFENDANT: Well, Your Honor, I'm competent now, but anything that large stuck inside your skull, it is mathematically impossible to say that something that large inside your brain would allow you to make good judgment decisions and rational decisions. It is impossible.

THE COURT: Mr. Puckett, you had, according to the records I looked at, and I -- in the presentence report, you've been convicted 23 times.

THE DEFENDANT: That's correct.

THE COURT: 8 of those were misdemeanors and 15 were obviously felonies then. That affects your credibility with the court.

Thank you.

And I consider what you say in light of those records -- that record.

Now, to consider further the objections --

THE PROBATION OFFICER: Your Honor, if I may ask the defendant if he has the medical records from Dr. Romero --

THE DEFENDANT: No. Dr. Birdsong and the medical

[28]

staff at FDC has those records. I was referred to MLEC.

THE PROBATION OFFICER: So he has the records from Mexico?

THE DEFENDANT: Yes, he does. My family provided those to him. And they have never been able to come up with the September 2002 cat scan. But I have -- I have every -- every medical record that -- that documents the symptoms of a brain tumor, neurological malfunctions, my claim of a brain tumor. The odds of me having -- saying I had a brain tumor and ended up having one are -- are lottery type odds. Brain tumors are very rare.

THE PROBATION OFFICER: Your Honor, I have reviewed the documents he's questioning. The only thing, I have not seen any documents saying that he was diagnosed with a brain tumor. I have

reviewed documents saying that he's had headaches and that he told staff --

THE COURT: You reviewed documents also that have stated this was from cocaine abuse. And I think it's kind of a draw on that.

What I'm interested in, was he competent to enter his plea of guilty, and I have yet to find anything that says to me that he was not competent to enter his plea of guilty.

And he says, in effect, himself, that he was competent. But now you're questioning that.

THE DEFENDANT: Well, when -- I didn't -- I don't

[29]

understand when I said that I was competent. I was asked in a neuropsychiatric evaluation by either Dr. Franks or Dr. Rattan, he asked me are you -- do you have intentions of withdrawing your plea right now.

And I said, no, I don't have intentions of withdrawing my plea right now, I have to wait until after this evaluation is -- is concluded to make that determination.

There are 15 different documented letters sent to counsel requesting that I withdraw my plea, starting in April 2004. And I -- I've asked -- that's why I ended up having to file my own withdrawal of plea.

THE COURT: Well, I questioned you at the time you entered your plea. I found that you were competent at that time. I have not seen anything

since that derailed your competence; it's just that you want to change your mind about it.

THE DEFENDANT: It -- it -- Your Honor, with all due respect, sir, there's no possible way -- the brain tumor was there when I pled guilty. That -- that is a fact.

And -- and there is no possible way that something that large inside a person's brain can -- cannot make somebody incompetent.

THE COURT: I don't know about that at all.

THE DEFENDANT: I understand that.

But I came in on September 4th, 2003, and I was so lost

[30]

that it -- excuse me -- the -- the arraignment had to be rescheduled for two more weeks. And I'm -- I'm -- you know, I don't have the skills and the knowledge as an -- an attorney, but I'm fairly versed at the laws and the judicial system.

THE COURT: I would gather that's true.

THE DEFENDANT: I mean, I've -- I wouldn't have ever made that plea. I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here.

Void of those promises, the consolidation of state charges by Jerry Sims, they haven't been -- they haven't been consolidated.

You know, promise for sentence reductions. I don't think they have happened. I base -- I base

my foundation, okay, in -- in entering a plea, of trying to understand anything, that, well, okay, I'm going -- there's some promises there, I'm dying anyway, you know. I was not competent at the time that -- that I entered a plea. It's impossible for somebody with a -- a brain tumor that large --

THE COURT: You know, I get some direct conflicts here, because -- from Dr. Rattan in June of --

THE DEFENDANT: That was after the tumor was removed, sir.

[31]

THE COURT: But you stated that you were not interested in setting aside the plea.

THE DEFENDANT: Not during the time of the evaluation, no, sir. I tried not to discuss my legal issues with Dr. Rattan. And it was 2004 when I met with Dr. Rattan. I was still recovering from brain surgery, which is, you know, a life and death situation.

THE COURT: All right. I don't have anything before me at this time, other than what you say yourself.

THE DEFENDANT: I understand that, sir. But I can -- I mean, what documentation -- would you like me -- I can prove that the tumor was dissected free from surrounding brain and neural tissue, which contradicts Dr. Mills' opinion. And I have the MRI here that will prove that the tumor affected and dissected brain tissue.

THE COURT: Where is that?

THE DEFENDANT: I've got it right here, sir. Can I get a drink of water please, sir?

(Pause for water.)

How do I enter this?

MR. CARLSON: What do you want to enter?

THE DEFENDANT: I want to enter this because it says the underlying tumor was dissected free from the surrounding brain and neural tissue.

MR. CARLSON: Okay. Your Honor, did you want me

[32]

to properly enter that?

Mr. Puckett would like to enter that into the record as evidence.

THE COURT: The government have any objection to it?

MS. SIMS: No, sir, we don't.

THE COURT: All right.

MS. SIMS: Your Honor, might I add to that that the medical records that were prepared in the order of the court for this evaluation, that that also be in the record. I think they're all attached to the government's response to his ineffective assistance of counsel, but all those records be included in the record.

THE COURT: They should be.

MS. SIMS: Yes, sir.

THE COURT: Granted.

This is Exhibit A-1 which has been admitted. It doesn't prove anything to me, Mr. Puckett.

THE DEFENDANT: Okay. I was just going by what it said.

THE COURT: It says, "Underlying tumor was then dissected free from the surrounding brain and neural tissues and once this was completed, the specimen was sent in to the pathologist after frozen section portion of the tumor was sent, as well. Much of this tumor was --"and that's the

[33]

blank. That's all it says.

THE DEFENDANT: What I'm saying is Dr. Mills, who is a doctor of osteopathy at FMC Fort Worth, didn't participate in any of my evaluations. All he did was look at the medical records, and he came up with an opinion that it was noninvasive. There's not much room inside the skull anyway, and when you stick a tennis ball inside there, something is going to be impressed, moved, damaged or altered.

I mean, I have a -- these MRI films here show I have a hole in my brain.

THE COURT: Well, I've looked at Exhibit A-1 --

THE DEFENDANT: I'll be happy to -- you know, I -- I -- I mean, the -- the brain controls all life functions.

THE COURT: Yes, sir. I've heard that.

THE DEFENDANT: And it only takes a concussion, a chemical imbalance, can -- can make a person

incompetent, much less something as large as that brain tumor.

And if -- if -- if a small brain tumor --

THE COURT: Where do I have the medical evidence?

THE DEFENDANT: I'll be happy to provide all my medical evidence to you, excuse me.

THE COURT: I don't want to see it right now. I see no reference to it in anything that's been given to me by you or your lawyer, particularly by you, that says

[34]

there's anything --

THE DEFENDANT: All I'm trying -- Your Honor, all I'm trying to do is refute and -- and show proof that the tumor was invasive, and that statement from the neurosurgeon said it was invasive.

THE COURT: But the question is do you have proof it made you incompetent on September 18th, '03?

THE DEFENDANT: I'm not -- I'm not a neuropsychologist.

THE COURT: I think that would be stipulated. But you're preaching that --

THE DEFENDANT: Well, I'm not trying to, but I have done my homework.

THE COURT: You have.

THE DEFENDANT: And I have studed well, and I have studied 20 hours a day for a long time.

THE COURT: Yep.

THE DEFENDANT: And I've researched -- I shouldn't ever have to do the research, but I did, because I wanted to know the truth.

There is not anybody that I can bring into this courtroom that can look at the size of that tumor model and say that that could not make me incompetent.

Dr. Mills didn't do that.

Dr. Franks made a retrospective peep back in -- a look

[35]

back in time. She didn't address my time of the plea. It's not addressed -- she addressed the time of the crime. She addressed the time that I went before her in April 2004.

She never said 45 days before you had life-saving brain surgery you were -- you were competent or incompetent. She didn't say that. She didn't address it. She was afraid to address it. She chose not to address it.

The same with Dr. Rattan. They made a retrospective look back in time. And there's no way anybody can go back in time 18, 20, 22 months back. They're making an assumption. There's no fact. I have factual evidence that -- that I had a brain tumor. Okay?

And I -- the symptoms of a brain tumor were documented for 18 months. If -- if -- if was -- if I wasn't suffering neurological, mental, and physical dysfunction caused by that brain tumor, there wouldn't have been a rush like there was to

remove that tumor. I was within 30 days of death. Okay?

And anything as large as that tumor stuck inside your brain, it -- it might -- I have the evidence here that shows that my brain was totally compressed and one side is three times larger than the other one. It only takes a neuron the size of a pinhead to cause a person to be incompetent. It doesn't have to -- you -- you don't have to rip half your brain off to be incompetent.

[36]

THE COURT: As I say, there is evidence before the court in these reports that you suffered from cocaine abuse. And that's causing a lot of your problems.

THE DEFENDANT: I know one thing, that brain tumor caused me a lot of problems too, Your Honor.

THE COURT: Well, you know that, but we're not going to argue about that anymore. I tried to hear you out fully on the matter.

THE DEFENDANT: Okay. I appreciate that.

THE COURT: I'll rule on the following which have been filed here. There are two objections which I haven't ruled on which are not controversial, that is the mother's age and father passed away, which I was sorry to learn about, last November. And that's added here and corrected in the presentence report.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: So far as the acceptance of responsibility, I just don't think I can do that under the circumstances here.

THE DEFENDANT: Okay.

THE COURT: And so I'll deny that.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Now, I believe that disposes of the objections made.

You were last examined by Dr. Mickey in September of

[37]

2005, complained of migraine headaches, made a self-report that I had a brain tumor was atypical and they recommend cat scans at six month intervals for the next year and then at yearly intervals thereafter, which I accept.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: I think we've dealt then with the objections to the presentence report. And what I'm looking at now, at this time, is a -- a guideline range on count 1, 34 offense level, criminal history category 6. So the range there would be 262 to 300 months on count 1 and on 7 years -- not less than 7 years on count 2. And I'll stay with 7 years. That's the minimum that's required to follow.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: And that must be imposed to run consecutively, as I understand it under the law.

THE DEFENDANT: Yes, sir.

THE COURT: There are also three revocations pending, as you know.

As to those, I would like to dispose of them here today and they will run concurrent with anything.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: And there is a motion for downward departure. And I haven't heard anything which will warrant me granting that, so I deny that.

[38]

I believe I've covered everything that is before me, although it's been maybe not in a totally organized fashion, but the question about the downward departure I've dealt with, the acceptance I've dealt with, and the mental situation I've dealt with, because of a lack of evidence before me in any way that there is any diminished capacity that would interfere with his competence. So I'm now dealing with the guidelines.

THE DEFENDANT: Yes, sir.

THE COURT: Which are as I stated.

THE DEFENDANT: Yes, sir.

THE COURT: Now then, what further before I proceed to sentencing?

MR. CARLSON: Your Honor, just to reiterate, in my sentencing memorandum I think that we would ask the court to depart -- or to consider the fact that, you know, it -- all of these factors combine. We would ask that the court take into account his physical situation, his mental situation, the

substance abuse history. He's -- he's had substance abuse issues since he was in his early 20s, if not earlier. And his just -- his just low -- his mental capacity in general and his -- and his situation in general, and needing additional monitoring for this brain tumor condition, we would ask the court to consider going below that guideline range that you just stated. And -- and that's -- so

[39]

basically I am reiterating what is in my sentencing memorandum.

THE COURT: Well, I don't think that's grounds for going below. It's grounds for providing medical attention, monitoring, medical care, and I certainly will provide for that. But that's all I can do.

Now then, I'd be glad to go ahead and proceed to sentencing at this time.

THE DEFENDANT: I'd like to --

THE COURT: I want to hear from him, of course.

MR. CARLSON: Yes, sir.

I think Mr. Puckett would like to address the court one more time before you do that, Your Honor.

THE COURT: Yes, sir.

THE DEFENDANT: Briefly.

I want to thank the United States Marshals, Ms. Cardinally (phonetic), and Ms. Parker for

ensuring in the last two and a half years that I got the best medical treatment possible.

THE COURT: Well, I think their colleagues will pass that along to them and I'm sure they will appreciate that.

THE DEFENDANT: If it wasn't for the marshal's service and Reed in that department in that facility, I would have died. And I'm very grateful to them. I'm

[40]

grateful to the marshal's service. They worked hard. They came and took me to independent appointments and, you know, they -- their assistance was above and beyond.

And I appreciate you taking the time to review and consider all my pro se motions, when you didn't have to do that. And I -- I'm grateful for that.

THE COURT: Thank you.

THE DEFENDANT: But when a man is living in a $300,000 house with $54,000 in his bank, new cars, good job, and he walks out of that house and robs a bank that he's known at, that his parents do business with, as I stated, under duress and under in my opinion neurological malfunctions -- there was no need for me to rob a bank for $4200 when I had access to 50 -- all I had to do was go write a check for 54 grand. Something has to be wrong. Something somewhere -- that -- that behavior is abnormal, and something out of the ordinary caused that to happen.

Void of duress, void of neurological malfunctions by a brain tumor that I had been previously diagnosed with, that crime wouldn't have happened. And I know this. That -- I know how I felt and what happened to me with that tumor in my head. I could ask anybody could they be certain if that tumor was in their head could they make rational decisions and I don't think anybody could be certain that they could.

But nobody addressed -- Dr. Rattan, Dr. Mills, Dr.

[41]

Franks, none of 'em -- none of 'em went back to September 18th, 2003, and said we make this determination that Mr. Puckett was competent on September 18th, 2003. It takes more when somebody's suffering a brain tumor -- from a brain tumor, it takes more than a few words and statements that he makes -- or that person makes to make the determination if that person is competent or not.

And I know that you're skilled in -- in being able to recognize whether somebody is competent, and I -- I respect that, Your Honor, but I'm sure over your 27 years -- and by the way, happy anniversary. In 27 years I -- I can't -- not knowing, but I wouldn't -- I wouldn't bet that you've had too many people come before you with a brain tumor that large. And I don't think there's anybody in this room today that can say that Jimmy Puckett was competent on September 18th, factually and evidencewise, because there's

not many people in here that know what a brain tumor like that does to you.

I do. Because I've studied it for the last two and a half years. I have 16,000 pages of medical research and evidence that will substantiate everything I've said.

But I appreciate the time that you've given me to speak, all the opportunities you've given me to file my pro se motions.

I appreciate Ms. Harpe's kindness and professionalism

[42]

and the same with Ms. Sims.

Thank you, Your Honor.

THE COURT: Well, thank you.

You speak very well. Sorry it couldn't have gone for another purpose.

THE DEFENDANT: Yes, Your Honor.

THE COURT: You've had since 1986 all these convictions, as you know, various kinds of things. They run the gamut, 15 felony convictions, which does enter into credibility, as I've stated before. And I'm not here to lecture. I just want you to know what goes into my making a decision about matters.

I've stated that the guidelines show on count 1 a 300 months, and 7 years on count 2, compulsory.

Do you want to say anything before I sentence -- incidentally, I want to say to you that Mr. Carlson is a well-regarded lawyer. I think you've

been fortunate to have had him and he has represented you well.

Did you want to say anything before I heard from Mr. Puckett?

Did you want to say anything?

MR. CARLSON: No, sir. Thank you, Your Honor.

THE COURT: All right. The government want to say anything?

MS. SIMS: No, sir.

[43]

THE COURT: All right. I'm going to go to the minimum of the guidelines, which is 262 months.

So on count 1 I sentence you to custody for 262 months, on count 1.

On count 2 I sentence you to 7 years, that is to be consecutive to the sentence imposed in count 1.

And that's the sentence of the court so far as a custody sentence is concerned.

Then there's no reason to order restitution or a fine. There's not the wherewithal to pay either.

I think the Mandatory Victim Restitution Act -- in fact, I'm sure it requires me to order restitution in the amount of $4275 payable to the District Clerk's office for disbursement as provided to the Guaranty Bank. And the payment would begin 60 days after release from custody, and the payment would be at the rate of $50 per month.

As to the supervised release, what -- is there a mandatory term on the supervised release? Ms. Sharp?

THE PROBATION OFFICER: Yes, Your Honor, I believe it's 5 years.

THE DEFENDANT: 5 years.

THE COURT: 5 years.

Then I sentence you to 5 years on count 1 and the same on count 2. It will run concurrent.

And I provide further in connection with your

[44]

supervised release period, that's when you're released, of course, that when on supervised release you must not commit another federal, state, or local crime and must not illegally possess a controlled substance, and you must refrain from the unlawful use of a controlled substance.

THE DEFENDANT: Yes, sir.

THE COURT: If you're not, you'll be back again, and nobody wants that.

You must submit to drug testing within 15 -- one drug test within 15 days of your release, at least two periodic drug tests thereafter, as directed by the probation office.

You must cooperate in the collection of DNA.

You must comply with the standard conditions of probation. Mr. Carlson can help get you those because they're not really restrictive or un --

they're easy enough to understand, but the court is required to recite them here.

One, you must not possess a firearm.

Second, you must report in person to the probation office in the district to which you're released within 72 hours.

Third, you must make restitution on the terms and amounts that are provided.

Fourth, you must provide to the probation officer any requested financial information.

[45]

And fifth, you must participate in a program approved by the probation officer for treatment of narcotic, drug, or alcohol dependency, that will include testing.

And you must abstain from the use of alcohol during this treatment.

You must contribute to the cost of services rendered at a rate of at least $25 per month.

And I think that covers it.

Is there anything further to be covered?

THE PROBATION OFFICER: Your Honor, I just -- I want to make a correction. The term of supervised release is not more than 5 years. You can -- it's 3 to 5 years.

THE COURT: Then it will be 3 years.

THE DEFENDANT: Thank you, Your Honor.

MR. CARLSON: Thank you.

THE COURT: It will be 3 years.

Now, I want to make clear that the sentence is pursuant to the advisory guidelines.

THE DEFENDANT: Yes, sir.

THE COURT: And the statutory provisions of 18 U.S.C. 3553(a). I might say, I spent a good deal of time reviewing each of those subparagraphs, because you have to look at them -- need to look at them in connection with the sentencing to take place, that's 18 U.S.C. 3553(a), and obviously tried to keep constantly in mind the provisions of

[46]

U.S. v. Booker, the celebrated case about making the guidelines advisory. And that's pretty much the reason.

Now, there is a matter of appeal, if he wants to appeal, that's up to you, Mr. Carlson, --

MR. CARLSON: Yes, sir.

THE COURT: -- what you want to do about that.

And is there anything else then to take up Ms. Sims? MS. SIMS: Not that I'm aware of, Your Honor.

THE COURT: I provide the special assessment of $100 on each count, didn't I?

THE DEFENDANT: Yes.

THE COURT: Yes.

Anything else that needs to be taken up from the standpoint of the probation?

THE PROBATION OFFICER: Not on this case, Your Honor.

THE COURT: All right. Thank you. Well, that's the only one we're going to talk about.

MR. CARLSON: Your Honor, just a couple of other matters.

THE COURT: Yes.

Incidentally, I want -- while Mr. Puckett is expressing appreciation, I'd like for him to express his appreciation of you. I know he's been critical of you, but I think you've done some real service for him.

[47]

MR. CARLSON: Thank you, Your Honor. I appreciate it.

THE DEFENDANT: I've learned a lot from Kem. I've been doing business with Mr. Carlson since 1990 and I've considered him a friend. He's done a lot for me. I've never questioned him doing things for me. I've never questioned his professionalism, his know-how. That wasn't what was questioned.

I -- I looked at -- we viewed things in a different way, and just because we disagreed doesn't mean that I don't appreciate everything that he's done for me. He's -- he's gone above and beyond and ran out of money two and a half years ago that I -- that we originally paid him, and he kept going and he kept going and he kept going.

THE COURT: He really did.

THE DEFENDANT: He's like the Energizer bunny. He kept going. I appreciate him very much.

THE COURT: I appreciate your making that for the record. There are some critical comments about him in some areas.

I think that concludes the proceeding from the government's standpoint?

MS. SIMS: Yes, sir, it does.

THE COURT: And from the probation officer's standpoint?

[48]

THE PROBATION OFFICER: Yes, Your Honor. There's nothing further.

THE COURT: Mr. Carlson.

MR. CARLSON: Yes, sir. Just a couple of other things.

I believe that you're aware that Mr. Puckett has pending cases based on this same spree of robbery in the state court, and -- particularly in Dallas County. I know there are -- and I'm sorry I didn't bring that with me, but I -- I believe there are one or two armed robbery cases over there, aggravated robbery cases over there. If there is anything that you could do --

THE COURT: There are three pending applications to revoke. Those are the ones you're referring to?

MR. CARLSON: No, sir. I was -- I was referring to the state cases that were committed around the same time that this offense was committed, and I didn't know whether there was a possibility that you may be able to affect the sentences in those cases -- cases so that they might run concurrently with -- with this case.

THE COURT: And, you know, I don't know. I don't think so, but I don't know. If you've got some way I can, give me some note on it or some authority. I'm not aware of anything.

MR. CARLSON: I'm not aware of any either, Your

[49]

Honor, but I just wanted to bring that to the court's attention.

And lastly, Mr. Puckett debriefed several times and the people that -- it's my understanding that the people he -- that he spoke about are currently incarcerated out in Beaumont and Pollock, in regard to his designation, Louisiana. So we'd -- if -- if there's anything that you could do as far as his placement, those -- those are -- he has -- he has fear of his -- of his physical well-being in those two institutions.

THE COURT: I remember those from some of the reading, that he was apprehensive about a couple of different places and several people. And I think it will serve purposes better, I'll put this in the J&C. I'm not sure I'll do -- I'll do whatever is the most effective.

THE DEFENDANT: Thank you, sir.

THE COURT: But give me in writing, if you will, this afternoon, no later than Monday, the places that you designated.

THE DEFENDANT: Yes, sir.

THE COURT: FC. Okay. I'll take care of that. As you know, I recommend to the Bureau of Prisons; function on their own.

THE DEFENDANT: Yes, sir. I understand that.

THE COURT: All right. We have pending also, and

[50]

I think I'm going to give you about a five minute recess and -- ten minute recess because I -- I would like to take up the probation revocations and -- I mentioned to you, Mr. Carlson, I won't make a secret of it, the -- go ahead and proceed on those, revoke them, I'll run them concurrent with what's been pronounced here.

MR. CARLSON: Your Honor, it's my understanding that Mr. Puckett wants to plead true to those allegations, and so we're ready to proceed whenever the -- the court is.

THE COURT: Why don't we go ahead and -- you might want to take a little recess for drink of water or restroom break.

And we'll be in recess for ten minutes.

MR. CARLSON: Yes, sir.

THE COURT: All right.

(Recess taken.)

THE SECURITY OFFICER: All rise.

Be seated, please.

At this time we'll take up the matter of the pending applications to revoke the supervised release of Mr. Puckett.

You want to come up there to the back with him.

I note that Ms. Sims is here and ready to proceed.

MS. SIMS: Yes, sir.

THE COURT: And Mr. Carlson, you're ready to

[51]

proceed?

MR. CARLSON: Yes, Your Honor.

THE COURT: What I have here, a petition for offender under supervision, name is Benjamin Puckett. Case number is 97-CR-093, 97-CR-175, 97-CR-176. These cases were originally pending with Judge Buchmeyer and were transferred to my docket, and the application in each situation is to revoke supervised release.

And are you -- are you familiar with these applications, Mr. Puckett?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And how do you plead to each one?

THE DEFENDANT: True.

THE COURT: Pleads true.

And you've talked to him about this?

MR. CARLSON: Yes, sir. We have talked about it, and I concur in that plea.

THE COURT: All right, sir. You're satisfied it's a knowledgeable plea?

MR. CARLSON: Yes, sir.

THE COURT: Then I'll accept the plea of true as to each of the three cases.

The statutory maximum is 2 years in each case. The policy statement provides for 33 to 41

months. And I intend to provide for the 24 months and to run it concurrent. But

[52]

I'd like to hear from you if there's something you'd like to say.

MR. CARLSON: Your Honor, I -- I -- at this point we don't -- we don't have any further thing to say on -- on that point.

THE DEFENDANT: I would be grateful for that, Your Honor.

Thank you.

THE COURT: All right. Then I revoke the supervised release in each of the three cases which I have previously described by number, and sentence in each case 24 months custody, and as to each case it's a total of 72 months -- not each case, but all three together, it's 72 months. And that is to run concurrently to the sentence assessed previously in CR-206, which is the case we spent a good deal of time talking about this morning.

And that will be the sentence of the court.

Anything further to take up, Ms. Sims?

MS. SIMS: No, sir.

THE DEFENDANT: What about the motion for -- one thing, Your Honor. I -- I had submitted a pro se motion for request for legal documents to transfer with me. Ms. Sims didn't have any objections to it. I don't believe Mr. Carlson did. But I'm in the kind of situation that not knowing when I'll be transferred I need -- I've got to make

[53]

preparations for transfer of these documents.

THE COURT: I intend to grant the motion.

THE DEFENDANT: Okay. Thank you, Your Honor.

THE COURT: In fact, I thought I had already done so.

THE DEFENDANT: I'm grateful for that.

I appreciate all the time that you spent with me now and -- and for everything, Your Honor.

I've learned a lot from you.

THE COURT: I wish you well.

THE DEFENDANT: I wish you well, too.

THE COURT: And we'll get those transferred for you.

THE DEFENDANT: Thank you, sir.

THE COURT: Do you have anything else from probation?

THE PROBATION OFFICER: No, Your Honor.

THE COURT: And the government? MS. SIMS: No, sir.

THE COURT: Good luck to you.

THE COURT: We're now in recess.

MR. CARLSON: Thank you, judge.

THE SECURITY OFFICER: All rise.

(Recess taken.)

CERTIFICATION

I, PAMELA J. WILSON, CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 11th day of September, 2006.

PAMELA J. WILSON, CSR
Official Court Reporter
The Northern District of Texas
Dallas Division

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 005000004658674

7h20DB 36

QUESTION PRESENTED

Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure.

PARTIES TO THE PROCEEDING

Petitioner is James Benjamin Puckett, defendant-appellant below.

Respondent is the United States, plaintiff-appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT IS AN INHERENTLY PREJUDICIAL DEPRIVATION OF NONFORFEITABLE TRIAL RIGHTS 10

A. A Plea Agreement Is A Contractual Exchange Of Waivable But Nonforfeitable Trial Rights For Particular Government Action 10

B. The Government's Breach Of A Plea Agreement Is An Inherently Prejudicial Violation Of The Defendant's Nonforfeitable Right To Not Plead Guilty 13

C. Because The Voluntariness Of The Defendant's Underlying Trial Waiver Is At Stake, The Lack Of An Objection By Counsel Is Irrelevant 17

II. THE PLAIN-ERROR DOCTRINE OF RULE 52(b) DOES NOT APPLY TO THE VIOLATION OF THE DEFENDANT'S NONFORFEITABLE RIGHT TO NOT PLEAD GUILTY 20

A. Rule 52(b)'s Language Does Not Address Errors For Which Reversal Is Already Required 21

B. The Multi-Part Test Of Plain Error Review Performs No Independent Work In Review Of Plea Agreement Breaches 22

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Boykin v. Alabama,
395 U.S. 238 (1969).....11, 12

Brady v. Maryland,
397 U.S. 742 (1970).....passim

Brookhart v. Janis,
384 U.S. 1 (1966)..... 12

Florida v. Nixon,
543 U.S. 175 (2004).....11, 12, 19

Gonzalez v. United States,
128 S. Ct. 1765 (2008)..... 12

Henderson v. Morgan,
426 U.S. 637 (1976).....17, 18

Hill v. Lockhart,
474 U.S. 52 (1985).....26, 27

Johnson v. United States,
520 U.S. 461 (1997)..... 22

Mabry v. Johnson,
467 U.S. 504 (1984).....passim

Machibroda v. United States,
368 U.S. 487 (1962)..... 11

McCarthy v. United States,
394 U.S. 459 (1969)..... 11

Neder v. United States,
527 U.S. 1 (1999) 22

New York v. Hill,
528 U.S. 110 (2000) 12

Nguyen v. United States,
539 U.S. 69 (2003) 20

People v. Santobello,
331 N.Y.S.2d 776 (N.Y. App. Div. 1972) 14

Santobello v. New York,
404 U.S. 257 (1971) ..... passim

Taylor v. Illinois,
484 U.S. 400 (1988) 12

United States v. Corsentino,
685 F.2d 48 (2d Cir. 1982) 20

United States v. Dominguez Benitez,
542 U.S. 74 (2004) 27, 28

United States v. Fant,
974 F.2d 559 (4th Cir. 1992) 28

United States v. Frady,
456 U.S. 152 (1982) 23, 24

United States v. McQueen,
108 F.3d 64 (4th Cir. 1997) 28

United States v. Munoz,
408 F.3d 222 (5th Cir. 2005) 8

United States v. Olano,
507 U.S. 725 (1993) ..... passim

United States v. Saling,
205 F.3d 764 (5th Cir. 2000) 29

United States v. Timmreck,
441 U.S. 780 (1979) 19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 1

U.S. Const. amend. VI 1

FEDERAL RULES

Fed. R. Crim. P. 52 ..... passim

USSG § 3E1.1 4

DECISIONS BELOW

Petitioner was sentenced by the District Court for the Northern District of Texas on September 11, 2006. The transcript of that proceeding is reproduced in the first volume of the Joint Appendix (J.A.) at 75a. The decision of the Fifth Circuit Court of Appeals is reported at 505 F.3d 377. That decision and the order of the Court of Appeals denying rehearing en banc are attached, respectively, as Appendix 1 and Appendix 2 to the petition for certiorari.

JURISDICTION

The court of appeals entered judgment on October 23, 2007, and denied en banc review on December 4, 2007. Pet. Apps. 1 & 2. A petition for certiorari was filed on March 3, 2008, and granted on October 1, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the U.S. Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be . . . confronted with the witnesses against him . . . ."

Rule 52(b) of the Federal Rules of Criminal Procedure provides in pertinent part: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

INTRODUCTION

This case involves an admitted breach of a plea agreement by the Government at sentencing. Contrary to its own precedent, the practice of many other courts of appeals, and the teachings of this Court, the Fifth Circuit declined to remand the case to allow petitioner to withdraw the guilty plea the Government induced by means of a false promise. The court of appeals found it significant that petitioner's counsel had not objected when the Government violated the sentencing promise underlying the plea. Applying the plain-error doctrine of Rule 52(b) normally applicable to review of unpreserved errors, the court determined that petitioner failed to show that he could have secured a lesser sentence on remand and thus had not carried his burden under Rule 52(b) of proving that the breach "affected a substantial right." Pet. App. 1, at 5.

The court asked the wrong question. This Court's precedents—especially *Santobello v. New York*, 404 U.S. 257 (1971)—have firmly established that a plea agreement breach does not implicate the question whether the sentencing might have been different. The focus, instead, is on the effect of the breach on the underlying plea itself. The same precedents make clear that, when the prosecution violates a promise made in exchange for a guilty plea, the violation inherently negates the voluntariness of the plea, rendering it invalid and in violation of due process. And because the defendant's counsel cannot waive the defendant's right not to plead guilty—the defendant must personally waive the right, under this Court's precedents—it is of no moment that defense counsel did not object when the Government unilaterally changed the

conditions under which the defendant waived his right to a trial. Accordingly, the limited review available under Rule 52(b) for unpreserved errors has no application in this context—a breach that changes the conditions under which a guilty plea is entered *compels* reversal of the conviction, as a matter of due process, unless the defendant knowingly and personally accepts the new conditions. And even if Rule 52(b)'s conditions were applied, they would necessarily be satisfied because of the inherently prejudicial nature of the underlying constitutional violation at issue. Either way, the breach of a plea agreement necessarily prejudices the defendant's right to a personal, knowing waiver of the right not to plead guilty—a right that cannot be forfeited on the defendant's behalf through lack of an objection by counsel.

The judgment of the Fifth Circuit should be reversed.

STATEMENT OF THE CASE

1. On July 10, 2002, a grand jury in the Northern District of Texas returned an indictment charging petitioner James Puckett with violating 18 U.S.C. § 2113(a) and (d) (bank robbery) and 18 U.S.C. § 924(c)(1) (firearm enhancement). Puckett pled not guilty on August 1, 2002, J.A. 133a, thereby preserving important constitutional rights—the right against self-incrimination; the right to a trial by jury; and the right to confront his accusers. Trial was originally scheduled for September 23, 2002, but Puckett requested and received continuances while he and the Government attempted to reach a satisfactory plea agreement. *See* J.A. 9a-14a.

By September 3, 2003, Puckett and the Government had negotiated a mutually agreeable arrange-

ment. Puckett agreed to plead guilty to both counts of the indictment, and he expressly waived multiple constitutional and statutory rights: his right "to plead not guilty"; his right "to have a trial by jury"; his right "to confront and cross-examine witnesses and to call witnesses in his defense"; his right "against compelled self-incrimination"; and his right "to appeal his sentence" or "contest his sentence in any post-conviction proceeding." J.A. 134a-35a.[1] In exchange, the Government agreed "that [Puckett] has demonstrated acceptance of responsibility and [thereby] qualifies for a three-level reduction in his offense level" and to "request" that Puckett's sentence be placed "at the lowest end of the guideline level deemed applicable by the Court." J.A. 135a. The written plea agreement was filed in the district court on September 3, 2003.

Under USSG § 3E1.1(a), a two-level reduction for acceptance of responsibility can be granted at the Court's discretion, but a three-level reduction requires that the government file a motion under § 3E1.1(b) "stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." The Government filed a § 3E1.1(b) motion on September 4, 2003, stating that Puckett had "assisted authorities in the investigation or prosecution of his

---

[1] Puckett reserved his right to appeal his sentence or contest it in a post-conviction proceeding on select grounds: ineffective assistance of counsel; "a sentence exceeding the statutory maximum punishment, an upward departure, or an arithmetic error at sentencing"; or the voluntariness of his plea. J.A. 54a-56a.

own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial." J.A. 57a-59a.

A probation officer filed a presentence report (PSR) in anticipation of sentencing in late 2003. J.A. 129a Consistent with the plea agreement, the PSR concluded that Puckett "has clearly demonstrated acceptance of responsibility for his offense" and that he "assisted the government in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial" and further permitting "the government and the Court to allocate their resources efficiently." J.A. 140a. In light of this finding, the PSR noted that, "[a]t the time of sentencing, the government will formally move the Court to grant the additional 1 level reduction," resulting in a three-level reduction for acceptance of responsibility. J.A. 140a-41a.[2]

Puckett's sentencing hearing was originally set for December 11, 2003, but was continued upon the discovery that Puckett had a "tennis ball-sized" brain tumor that required surgical removal. J.A. 86a. Sentencing was continued several times during the course of Puckett's medical treatment and subsequent examinations to determine his competency. Pet. App. 1, at 1. On November 8, 2005, Puckett moved to withdraw his plea on the grounds that his tumor had ren-

---

[2] The probation officer filed an addendum to the PSR later in 2003, responding to objections made by Puckett to the PSR. Those objections and the addendum are not material here, but the addendum is reproduced at J.A. 193a-97a.

dered him incompetent to plead guilty and because he wished to raise a diminished-capacity or mental-defect defense at trial. Pet. App. 1, at 1; J.A. 27a. The district court denied that motion on March 20, 2006. J.A. 29a.

Pursuant to the trial court's request, a supplemental addendum to the PSR was filed in April 2006. The supplemental addendum amended the PSR's findings regarding acceptance of responsibility. According to the supplemental addendum, Puckett admitted assisting another man in a scheme to defraud the U.S. Postal Service in 2005. J.A. 199a. It accordingly found that acceptance of responsibility had not been demonstrated because Puckett "continued to be involved in criminal conduct after he entered his plea of guilty to the instant offense." J.A. 199a-200a.

In light of the new PSR determination, but without giving prior notice to defense counsel, the Government at sentencing reneged on its contractual promise—incorporated in the plea agreement—to urge a three-level reduction in Puckett's offense level. Instead the Government expressly "object[ed] to [Puckett] receiving any acceptance of responsibility levels." J.A. 79a. Puckett's counsel did not object on the specific ground that the Government had breached its promise in the plea agreement. He did argue, however, that the reduction should apply, noting that Puckett "did previously accept responsibility by entering a plea of guilty" and "has debriefed with a number of agents, at least four agents, in regard to other matters, and has consistently admitted his guilt." J.A. 79a. Puckett himself further stated that "I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here. . . .

You know, promise for sentence reductions. I don't think they have happened." J.A. 104a.

The Government has expressly acknowledged that the prosecutor's actions at sentencing were a plain breach of its promise and obligation under the plea agreement. Pet. App. 1, at 3; Gov. Cert. Resp. 7. Under the agreement, the Government expressly stated that "Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." J.A. 54a, ¶ 8. At sentencing, however, the Government not only withdrew its support of Puckett's request for a reduction, but actively argued against it. Left to be his only advocate, Puckett was substantially disadvantaged by this change in position. As the trial court noted, Puckett's criminal history "affects your credibility with the court" at sentencing. J.A. 102a, 116a.

The district court refused Puckett's request for a downward departure for acceptance of responsibility, citing the allegation of criminal conduct contained in the presentence report. J.A. 80a-81a. This resulted in a guidelines range of a 262- to 300-month sentence for Count 1; had the downward departure been granted, the guidelines range would have been between 188 and 235 months. J.A. 81a. The district court did note the government's recommendation that Puckett be sentenced at the low end of the guidelines range and stated that it "intend[ed] to follow that." J.A. 81a.

The district court sentenced Puckett to 262 months of imprisonment for Count 1 and a consecutive term of 84 months of imprisonment on Count 2. J.A. 117a.

2. Puckett appealed to the U.S. Court of Appeals for the Fifth Circuit. He argued, among other things, that under Fifth Circuit precedent, the Government's

breach of his plea agreement automatically entitled him to withdraw his guilty plea, even absent an express objection at sentencing based on the Government's breach.

The Fifth Circuit affirmed. The court of appeals panel acknowledged conflicting intra-circuit precedent regarding the proper application of plain-error review in the context of breached plea agreements. One line of cases held that an established breach of a plea agreement requires reversal even when no objection is made in the trial court, and without requiring a show of prejudice. *See, e.g., United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005). Another line held that a breach "*can* constitute plain error, but will not always warrant reversal." Pet. App. 1, at 3. The court in this case followed the second line of cases, holding that because Puckett had "made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility," he had not shown plain error. Pet. App. 1, at 5. Puckett's petition for a rehearing en banc was denied. Pet. App. 2. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. A prosecutor's breach of a plea agreement necessarily vitiates the voluntariness of the underlying plea and therefore inherently prejudices the most fundamental right a defendant possesses: the right to force the Government to prove its case through a trial by a jury of the defendant's peers. In a plea agreement, the defendant voluntarily agrees to waive his right to a trial, but only because the prosecution, in exchange, agrees to make particular sentencing recommendations. When the prosecution fails to adhere to that

bargain, it alters the conditions under which the defendant elected to waive his trial rights, thus rendering the waiver involuntary by definition, as this Court has repeatedly held. And because the right to a trial cannot be waived by counsel, it cannot be forfeited by counsel's silence either. The defendant must personally waive the right to a trial, as this Court has also repeatedly held, and when an earlier waiver is rendered involuntary by a prosecution breach that effectively imposes new terms on the agreement, only a new personal waiver by the defendant in light of those new terms can reestablish the voluntariness of the plea. Absent a new waiver, the plea must be withdrawn.

II. The plain-error doctrine of Rule 52(b) does not apply to the prosecution's violation of a plea agreement for two reasons. First, the Rule does not apply by its own terms. The Rule's language gives appellate courts authority to review, under limited circumstances, errors they would otherwise lack authority to review as forfeited. But some errors cannot be forfeited and must be reviewed on appeal. Because such review is mandated by the Constitution (or an applicable statute), it cannot be restricted by a rule of procedure.

Second, plain-error review under Rule 52(b) should not apply because the doctrine has no independent operative force in reviewing a plea agreement breach to which defense counsel did not object. A plea agreement breach cannot be "plain" to the court, which normally does not know the terms of the agreement. And this Court's precedents have already established that the breach directly affects the defendant's "substantial rights," by vitiating the voluntariness of his

plea. The Fifth Circuit thus erred in focusing on the effect of the breach on petitioner's *sentence*. The correct focus must be on the defendant's *plea*, as this Court has repeatedly held, and because a plea agreement breach falsifies the conditions under which the defendant waived his right to a trial, it necessarily affects his substantial rights. Finally, the effect on the fairness and integrity of the trial proceedings is equally clear. A prosecutor's failure to abide by promises made to induce a guilty plea casts serious doubt on the honor of the government and undermines public confidence in the integrity of the adversarial trial system. Ignoring a plea breach, and allowing an involuntary plea induced by misrepresentation to stand for lack of objection by counsel, only exacerbates the unfairness to the defendant caught in the middle between the prosecutor's breach and defense counsel's omission.

ARGUMENT

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT IS AN INHERENTLY PREJUDICIAL DEPRIVATION OF NONFORFEITABLE TRIAL RIGHTS

A. A Plea Agreement Is A Contractual Exchange Of Waivable But Nonforfeitable Trial Rights For Particular Government Action

Two inherent features of plea agreements govern the inquiry in this case.

The first is that a "plea bargain" is just that—a bargained-for-exchange. The defendant agrees to forgo his constitutional right to a trial, but only in exchange for (in this case, as in many others) a recom-

mendation by the Government for a particular sentence or sentencing range. It is only because "each side may obtain advantages when a guilty plea is exchanged for sentencing concessions" that plea bargains are deemed enforceable—the fact that the defendant receives the sentencing concession as consideration for forgoing trial makes the agreement "no less voluntary than any other bargained-for exchange." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984); *see Brady v. Maryland*, 397 U.S. 742, 752 (1970) (emphasizing "mutuality of advantage" that constitutionally justifies plea bargains).

The second critical feature of plea bargains is that the rights the defendant gives up in the bargain are constitutional trial rights of the highest constitutional order. A "guilty plea is a grave and solemn act," *Brady*, 397 U.S. at 748, which implicates the waiver of multiple fundamental trial rights. "By entering a guilty plea, a defendant waives several constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront accusers." *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *see Brady*, 397 U.S. at 748; *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Because a waiver of any of those trial rights is valid only if is it voluntary and knowing, *see McCarthy*, 394 U.S. at 466, a guilty plea can validly waive such rights only if the guilty plea itself is "equally voluntary and knowing"; if it is not, "it has been obtained in violation of due process and is therefore void." *Id.*; *see Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character

of a voluntary act, is void."); *see also Boykin*, 395 U.S. at 242 ("same standard" of voluntariness that governs waiver of fundamental trial rights governs guilty pleas).

The rights waived by a guilty plea include a right deemed so fundamental in our constitutional order—*viz.*, the right of a defendant to put the Government to its proof of guilt in a trial before a jury of his peers—that it "cannot be waived by the attorney alone." *Gonzalez v. United States*, 128 S. Ct. 1765, 1769 (2008). This Court has repeatedly described the right to plead not guilty as a "basic right[] that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client." *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *see Nixon*, 543 U.S. at 187 ("counsel lacks authority to consent to a guilty plea on a client's behalf"); *New York v. Hill*, 528 U.S. 110, 114 (2000) ("the defendant must personally make an informed waiver" of right to plead not guilty (citing *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966))). The right to plead not guilty and go to trial, in short, is a *waivable* but not a *forfeitable* right. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing between "forfeiture" and "waiver"). It cannot be forfeited by mere inaction or omission, *see id.* ("forfeiture is the failure to make the timely assertion of a right"), but instead can be forgone only if the defendant personally declares his intention to waive it, and only then if the declaration of willingness to forgo trial is a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

B. The Government's Breach Of A Plea Agreement Is An Inherently Prejudicial Violation Of The Defendant's Nonforfeitable Right To Not Plead Guilty

In a series of cases involving the validity and enforcement of plea agreements, this Court applied the forgoing principles to establish firmly that a guilty plea entered pursuant to a plea agreement is consistent with due process *only* to the extent the Government adheres to the promises it made to induce the plea. Because a breach of those promises *necessarily* vitiates the voluntariness of the guilty plea, such a breach inherently prejudices the defendant's fundamental, nonforfeitable right to plead not guilty.

In *Brady*, the Court established "the standard as to the voluntariness of a guilty plea," 397 U.S. at 755; *see Mabry*, 467 U.S. at 509 (*Brady* "state[s] the applicable standard" for voluntariness), and expressly included within that standard the Government's adherence to its promises as an essential condition of a properly voluntary plea:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), *misrepresentation (including unfulfilled or unfulfillable promises)*, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).

Brady, 397 U.S. at 755 (quotation omitted; emphasis added).

In *Santobello*, the Court applied *Brady*'s voluntariness standard to the "unfulfilled promises" *Brady* contemplated. In *Santobello*, the prosecutor entered into a plea agreement with the defendant in a case involving two gambling-related felony charges. In exchange for the petitioner's guilty plea to a lesser-included offense that carried a maximum sentence of one year, the prosecutor agreed not to make a recommendation at sentencing. 404 U.S. at 258. A second prosecutor, ignorant of these arrangements, recommended the maximum sentence at sentencing and thereby breached the agreement. *Id.* at 259. The defendant objected, but the trial court judge explained that the recommendation was immaterial: "I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence." *Id.*

The judge instead purported to rely entirely on the probation report, which revealed that Santobello, a convicted murderer, was "notorious" and "has an unbroken record of vicious criminality. He is not amenable to any restraint and is completely asocial. He should be among the last persons to be a legitimate object of leniency." *People v. Santobello*, 331 N.Y.S.2d 776, 778 (N.Y. App. Div. 1972) (Steuer, J., dissenting). The trial judge agreed with the probation report and sentenced Santobello to the maximum sentence of one year. 404 U.S. at 258.

Indeed, the report was so damning as to permit the State to argue in this Court that "Santobello must have appreciated that, in view of his criminal record, he could hardly have escaped incarceration under any circumstances." Resp. Br. 11, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133497. And Santobello himself harbored no illusions about faring bet-

ter on remand—he freely acknowledged that he "would face a substantially stiffer sentence if permitted to go to trial on the original charges" and convicted on remand. Petr. Br. 12-13, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133498. But he argued that the issue was "not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation." *Id.* at 9.

The State admitted the breach on review before this Court but urged the Court to find it harmless, citing the trial judge's exclusive reliance on the report, rather than the sentencing recommendation.

The Court declined the invitation, and agreed with Santobello that the misrepresentation in the form of the unfulfilled promise required reversal *regardless whether the breach had any effect on the sentence below.* While obtaining guilty pleas through bargaining and inducements is "highly desirable" practice for many reasons, the Court explained, "all of these considerations presuppose fairness in securing the agreement between an accused and a prosecutor." 404 U.S. at 261. Thus, a "constant factor" in all guilty plea proceedings "is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise *must be fulfilled.*" *Id.* at 262 (emphasis added). What is more, the Court held, the question "whether the sentencing judge would or would not have been influenced" by a different recommendation was simply irrelevant to the constitutional violation, *id.*, which was not about the sentence itself at all. The constitutional error was in-

stead the antecedent deprivation of Santobello's due process rights in inducing an involuntary plea—or, more precisely, a plea that effectively became involuntary when the prosecution later failed to adhere to its promise:

> On this record, petitioner "bargained" and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. . . . [A]t this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial [to the judge's sentencing decision]. . . .

Id. Thus, reversal was required not because of any prejudicial error in the *sentence*, but because of "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." *Id.*

Finally, in *Mabry*, the Court reiterated that the voluntariness of a guilty plea depends on the Government's adherence to promises made to induce the plea. The breach in *Santobello*, the *Mabry* Court observed, "illustrates the point" that a guilty plea violates the Due Process Clause "when it develops that the defendant was not fairly apprised of its consequences." 467 U.S. at 509. Santobello had "pleaded guilty thinking he had bargained for a specific prosecutorial sentencing recommendation, which was not ultimately made." *Id.* That breach rendered his *underlying guilty plea*—not his subsequent sentence—invalid, the *Mabry* Court explained, because of the constitutional rule *Santobello* applied: "[W]hen the prosecution breaches its promise with respect to an executed plea agree-

ment, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509.

C. Because The Voluntariness Of The Defendant's Underlying Trial Waiver Is At Stake, The Lack Of An Objection By Counsel Is Irrelevant

For reasons that should by now be apparent, it is immaterial to *Santobello*'s constitutional rule whether the defendant's counsel raises an objection at sentencing when the prosecution violates the promise that induced the defendant's plea. As explained above, *supra* at 12, a defendant can plead guilty only if he *personally* makes a *voluntary* waiver of his right to go to trial, which requires him to understand all the circumstances and likely consequences of the plea. Thus, in *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court held that a plea was involuntary, requiring reversal of the conviction as matter of due process, where the defendant was not advised as to a critical element of the crime for which he was charged, even though his counsel *did not object* to the omission of the element. *Id.* at 646. The lack of objection did not diminish the violation or restrict the standard of review; to the contrary, counsel's failure to ensure that the defendant accurately understood the circumstances and consequences of his plea helped *create* the constitutional error that rendered his plea involuntary and required reversal as a matter of law. *Id.*

The same principle must apply when the prosecution later unilaterally *changes* the circumstances and consequences of the plea, making a premise of the defendant's plea false. Just as with a constitutionally defective initial plea colloquy, a later breach of the

agreement underlying the plea necessarily vitiates the voluntariness of *initial* plea, as *Santobello* and *Mabry* make clear. The prosecutor's breach essentially substitutes new plea terms in the place of those agreed to by the defendant: instead of sentencing recommendation "X" in exchange for his trial waiver and guilty plea, the defendant will now receive recommendation "X+2," or "X+10," or whatever the prosecutor has decided—unilaterally—would be a better deal for the prosecution. But since there is no express, personal statement from the defendant agreeing to waive his trial rights under those new and different circumstances, the prior plea is no longer valid.

If the "new" plea terms are to be accepted by the defendant, effectively restoring the voluntariness of the underlying plea, another waiver of the right not to plead guilty is required, and that waiver necessarily must be the same personally expressed, knowing and voluntary waiver required for any plea. Defense counsel alone can no more accept an implicit new plea deal on the defendant's behalf, by simply failing to object to the prosecutor's breach at sentencing, than counsel can allow an involuntary plea to be entered in the first place by failing to object to an error in the plea colloquy that vitiates the voluntariness of the plea. If defense counsel cannot expressly waive a defendant's trial rights, counsel certainly cannot forfeit them by silence. *See Henderson*, 426 U.S. at 650 (White, J., concurring) ("[I]t is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent—his lawyer. Our cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea . . . ."). The

logic of the basic plea/waiver rule applies inexorably to the new plea terms effectively imposed by the prosecution: because "counsel lacks authority to consent to a [new] plea on a client's behalf," a "defendant's tacit acquiescence in the decision to plead [on new terms] is insufficient to render the plea valid." *Nixon*, 543 U.S. at 187-88.[3]

Requiring the defendant to adhere to new plea terms merely because his counsel failed to object also serves no valid policy objective of the plea bargaining process. This Court has emphasized the importance of finality in guilty pleas, *see, e.g., United States v. Timmreck*, 441 U.S. 780, 784 (1979), but imposing a contemporaneous-objection requirement would do little to further the interest of finality. In the ordinary case, the contemporaneous-objection requirement advances finality by promoting immediate resolution when the error arises at trial. But where the prosecution breaches a promise underlying a guilty plea, and argues *against* a sentence reduction rather than *for* it, an objection comes too late. As *Santobello* specifically recognizes, the trial judge's assessment of the appropriate sentence is irretrievably affected by the prosecution's recommendation—the bell cannot be unrung. *Santobello*, 404 U.S. at 262-63. Little can be gained before the same sentencing judge by forcing the prose-

---

[3] Certainly there is no greater practical basis for presuming that a defendant's own silence at sentencing reflects tacit acquiescence in new plea terms than there is for presuming that silence reflects acquiescence at an initial plea conference. Laypersons cannot be expected to understand the details of various Guideline ranges, levels, point reductions, and enhancements well enough to understand whether the prosecutor's statement adheres strictly to the terms of a plea agreement.

cutor to retract the breaching statement and to replace it with a conforming one. *See United States v. Corsentino*, 685 F.2d 48, 51 (2d Cir. 1982) ("[I]t is unlikely that any objection could have remedied the situation.").[4]

II. THE PLAIN-ERROR DOCTRINE OF RULE 52(b) DOES NOT APPLY TO THE VIOLATION OF THE DEFENDANT'S NONFORFEITABLE RIGHT TO NOT PLEAD GUILTY

Given the nature of the constitutional violation involved, Rule 52(b) does not apply—and cannot sensibly be applied—to appellate review of a prosecutor's plea agreement breach to which the defendant's counsel did not object. Not every error is necessarily subject to the plain-error doctrine. *See Nguyen v. United States*, 539 U.S. 69, 80-81 (2003). In *Nguyen*, this Court held that a defendant's failure to object to the unlawful composition of a judicial panel did not subject the error to review for plain error. *Id.* at 80-81. Even if the defendant had affirmatively *agreed* to the improper composition, the Court explained, the defect would have required reversal, rendering the defendant's lack of objection—the essential prerequisite for Rule 52(b)'s application—categorically irrelevant to appellate review. *Id.*

---

[4] It also bears emphasis that prosecutors do not make a routine practice of breaching plea agreements—violating agreements with impunity would, of course, severely undermine prosecutors' ability to obtain pleas *ab initio*. "[C]oncerns for gamesmanship, which animate the requirement for contemporaneous objection, therefore dissipate in these cases in light of the rarity of the [conduct] at issue." *Nguyen v. United States*, 539 U.S. 69, 81 n.12 (2003).

The error in this case is different from the error in *Nguyen*. But like the error in *Nguyen*, the error here is not one susceptible to plain-error review under Rule 52(b), as shown below.

A. Rule 52(b)'s Language Does Not Address Errors For Which Reversal Is Already Required

To start, the Rule by its terms does not appear to address errors of the kind involved here and in *Nguyen*. Rule 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Rule thus gives appellate courts affirmative (but limited) authority to consider errors *they could not otherwise consider*—i.e., errors forfeited by the defendant by lack of a timely objection. For that category of errors, Rule 52(b) gives appellate courts authority they would not necessarily possess in the absence of a rule or analogous judicial doctrine applied in the exercise of the federal courts' inherent supervisory authority.

Errors like the violation of a plea agreement, or the unlawful composition of a judicial panel under *Nguyen*, fall in a separate category—they are errors an appellate court is *already required* to consider, even absent authority conferred by the Rule. In *Nguyen*, the Court held that appellate review was effectively compelled by the congressional statute establishing the composition of the judicial panel. Here, the *Brady-Santobello-Mabry* line of cases makes clear that appellate review is compelled by due process, which requires an appellate court to reverse a conviction based on a guilty plea that lacked a personal, knowing and voluntary waiver of trial rights by the

defendant. Rule 52(b) thus gives the court no appellate review authority it does not already have—indeed, to the extent the Rule's conditions would prohibit the Court from reversing a conviction in federal court where the Constitution itself would require reversal in state court under the same circumstances, the Rule itself would violate the Constitution and could not be followed.[5]

B. The Multi-Part Test Of Plain Error Review Performs No Independent Work In Review Of Plea Agreement Breaches

The multi-part standard for conducting plain-error review under Rule 52(b) also need not be applied to review of a plea agreement breach because the standard does no substantive work in this context.

---

[5] In *Johnson v. United States*, 520 U.S. 461 (1997), the Court asserted in dicta that "structural errors", which require reversal even absent specific prejudice to the defendant, are still subject to Rule 52(b) in the federal system when the error is not preserved. *Id.* at 466. The passage is dicta because the Court did not find the asserted error in that case—the failure to submit materiality to the jury—to be structural, *id.* at 469 ("It is by no means clear that the error here fits within this limited class of cases."), and the Court later affirmatively held that the error was *not* structural, *see Neder v. United States*, 527 U.S. 1, 8 (1999). What is more, the Court's later decision in *Nguyen* establishes that some structural errors are *not* subject to plain-error review, *Johnson*'s dictum notwithstanding. In any event, even if an unpreserved structural error is ordinarily subject to plain-error review, the error here is different because, while error-preservation may arguably be relevant to review of most structural errors, *see id.* at 34-35 (Scalia, J., dissenting), defense counsel's failure to object is *categorically irrelevant* to review of an involuntary guilty plea—since defense counsel simply cannot speak for the client in this narrow situation, counsel's failure to object is meaningless.

1. This Court has construed Rule 52(b) as imposing a four-part test that must be satisfied by a defendant seeking reversal on the basis of a trial error not preserved by a contemporaneous objection. *United States v. Olano*, 507 U.S. 725, 733-34 (1993). First, there must be an "error." *Id.* Second, the error must be "plain," which essentially means "obvious." *Id.* This requirement limits the Rule's application to an "error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982).

The latter two prongs address the effect of the error on the defendant and on the judicial proceedings, respectively. The third prong of the test requires that the error affect "substantial rights" of the defendant. *Id.* at 734. That inquiry "normally" requires a "specific analysis of the district court record . . . to determine whether the error was prejudicial," *id.*, but a specific inquiry into prejudice may not be required "in every case," *id.* at 735. In *Olano*, the Court noted two related types of errors that may not be subject to specific review of prejudice: "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* at 735.

The fourth prong, finally, reflects that the Rule is "permissive, not mandatory"—the court may "order correction, but is not required to do so." *Id.* at 735. In exercising that discretion, the appellate court should correct a plain error "if the error seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quotation omitted).

2. That structure cannot be meaningfully applied to review of a prosecutor's breach of a plea agreement. To the extent it even makes sense to apply plain-error review to an error that can never be "plain" to the court, the structure does no meaningful work because, by the very nature of the constitutional violation already identified in this Court's precedents, the violation—once established—will *always* satisfy the requirements for reversal under the plain-error review standards.

a. The obviousness of the breach in this case is not contested here. Gov. Cert. Resp. 7, 12. But it is hardly clear, in any event, that it even makes sense to apply this factor to review of a plea agreement breach. As noted above, the obviousness of an error is relevant because Rule 52(b) is designed to permit review only of errors so obvious that either the court or the prosecutor should have noticed and corrected them even without objection from counsel. *Frady*, 456 U.S. at 163. But normally the court does not know the terms of the plea agreement, and thus cannot know whether there is any error to correct. And while the prosecutor obviously is or should be aware of the breach, one can hardly expect the prosecutor to notice and correct the error, since it is the prosecutor's own negligence or mendacity that produced the breach in the first instance.

The poor fit between the obviousness factor and review of a plea agreement breach underscores the disconnect between the essential purpose of the plain-error review doctrine—limiting review to errors susceptible to correction by the court below if timely no-

ticed—and review of a plea agreement breach, which the court cannot notice on its own, and which the court could not correct even if it did. Asking whether an error is so plain the court should have noticed and corrected it—the whole point of Rule 52(b)—is necessarily a futile and pointless exercise.[6]

b. Next, the adverse effect of a plea agreement breach on "substantial rights" could hardly be more plain. Indeed, that issue was settled conclusively in *Santobello*. The square holding of *Santobello*, as *Mabry* explains, is that "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509. A plea agreement breach, in other words, *inherently* vitiates the voluntariness of the guilty plea itself, requiring reversal of the underlying conviction. That is true essentially by definition because, as explained above, the "mutuality of exchange" is precisely what makes a plea bargain voluntary and thus constitutionally legitimate. When the prosecution voids its side of the exchange, it necessarily voids the mutuality that made the plea voluntary. Accordingly, a plea agreement breach is within the

---

[6] Assuming the obviousness factor is relevant to review of a plea agreement breach, however, normally any breach of a material condition of a plea will be as obvious as the breach here—if the condition is a material term of the agreement, and the prosecutor fails to adhere to it, the error should be obvious. In some cases, however, it may not be clear whether the prosecutor actually violated the agreement, in which case the error may not have been obvious enough to notice absent a timely objection. Thus an obviousness inquiry may serve some function in some cases, assuming this factor can sensibly be applied in this context at all.

category of errors "that should be presumed prejudicial." *Olano*, 520 U.S. at 735.

To be clear, a plea agreement breach is prejudicial *not* because of any possible effect on the judge's sentence, but because of its effect on the underlying plea. That is the lesson of *Santobello* and *Mabry*. The Fifth Circuit thus erred in this case—whether the plain-error doctrine nominally applies or not—by holding that the breach was not prejudicial because the judge would have denied Puckett the three-level reduction anyway. Puckett contends—and the Government has never disagreed or shown otherwise—that if the Government had not promised to seek a three-level reduction, he never would have entered the plea agreement. While the *Brady-Santobello-Mabry* rule assumes such prejudice as a categorical matter, the specific facts here illustrate and confirm the problem. Puckett initially entered a plea of not guilty. The promise that the Government ultimately breached was one of only two promises it made in the plea agreement and thus was clearly "part of the inducement or consideration" upon which the plea rested. *Santobello*, 404 U.S. at 262. Puckett explicitly confirmed this at sentencing: "I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here. . . . You know, promise for sentence reductions. I don't think they have happened." J.A. 104a. But for the Government's false promise, he never would have faced the denial of the reductions he was hoping for—he simply would have gone to trial. That route of course would have had its own significant risks, and may have made him even worse off, but that was his choice and his (nonforfeitable) right. Santobello faced the same prospect of a

worse fate from vitiation of his plea agreement, yet this Court did not hesitate to declare him inherently prejudiced, even while fully agreeing that judge was not influenced at all by anything the prosecutor said.

Santobello's holding that a plea agreement breach inherently prejudices the voluntariness of the plea itself, rather than the sentence, is consistent with other cases addressing the prejudice inquiry for unpreserved errors relating to a plea, but not affecting its fundamental voluntariness. *See United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill v. Lockhart*, the petitioner sought habeas relief after pleading guilty to murder. *Id.* at 53-55. He alleged ineffective assistance of counsel "because his attorney had misinformed him as to his parole eligibility date." *Id.* at 54. Unlike this case, *Hill* did not involve a colorable claim that the guilty plea was involuntary or unknowing. *Id.* at 56. But the Court nonetheless allowed for the possibility of relief, *if* the petitioner could show that he suffered "prejudice" on account of the ineffective assistance. *Id.* at 58. That showing turned on whether the petitioner could show that his counsel's performance "affected the outcome of the plea process"—specifically, "that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Dominguez-Benitez involved technical errors in the formalities of the plea colloquy mandated by Federal Criminal Rule 11. Because Rule 11 errors do not eviscerate the fundamental bargain underlying a guilty plea, unpreserved Rule 11 errors are subject to review for specific prejudice under Rule 52(b). *See Dominguez-Benitez*, 542 U.S. at 83 (explaining that

showing of prejudice was required in part because "the violation claimed was of Rule 11, not of due process"). But the prejudice that matters, the Court explained in *Dominguez-Benitez*, is the effect of the error on the defendant's decision to plead guilty: "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83.

These cases confirm the rule stated or applied in *Brady*, *Santobello*, and *Mabry*: an error affecting the plea is prejudicial when it undermines the voluntariness of the plea, as is inherently true for the prosecutor's breach of a sentencing promise essential to the plea.

c. In addition to establishing the inherent prejudice of a plea breach, *Santobello* also conclusively resolves the fourth prong of plain-error review—whether the error "seriously affect[s] the fairness, integrity or public reputation" of the judicial proceeding. *Olano*, 507 U.S. at 732 (quotation omitted). Reversal was compelled, the *Santobello* Court explained, by "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." 404 U.S. at 262. *Santobello* recognizes that when the prosecution violates a promise made to induce a guilty plea, the violation casts serious doubt on the "the honor of the government" and undermines "public confidence in the fair administration of justice." *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); *see United States v. Fant*, 974 F.2d 559, 564 (4th Cir. 1992) (plea agreement violation "undermin[es] the credibility of

the criminal court system and the promises made by its officers"). Ignoring a breach for failure of defense counsel to object, thereby allowing the Government to benefit directly from wrongful or even fraudulent conduct by its officers, would only further erode confidence in the system. And while that system is adversarial, the public hardly expects the system to allow defendants to get caught between a prosecutor's misconduct and defense counsel's oversight. The fourth prong of plain-error review is thus easily satisfied by the prosecution's breach of any plea agreement.

* * * *

The foregoing analysis demonstrates that the multi-factor plain-error review doctrine has no independent operative force when applied to review of plea agreement breach to which defense counsel did not object. Because the doctrine serves no logical or substantive function in this context, it need not be applied—when the prosecutor fails to adhere to the promises made to induce a guilty plea, whether noticed by defense counsel or not, the conviction should be reversed and the case remanded to allow the defendant to make the informed and personal decision whether to plead guilty under the new conditions and circumstances created by the prosecutor's breach.[7]

---

[7] Under Fifth Circuit precedent, the defendant victimized by the breach is allowed to elect the remedy appropriate to make his plea voluntary: withdrawal of the plea or specific performance of the plea in sentencing before a new judge. *See United States v. Saling*, 205 F.3d 764, 767-68 (5th Cir. 2000). That is the correct approach to the remedy, since the defendant himself must personally waive his right to a trial with knowledge of all the relevant circumstances. In any event, the question of the appropriate remedy is not before this Court.

Another way to reach the same resolution, of course, is to say that the plain-error review doctrine of Rule 52(b) *does* apply to review of a plea agreement violation to which defense counsel did not object, but that each of the doctrine's requirements is necessarily satisfied for any material breach of a plea agreement's terms. It is, in substance, a distinction without a difference—a guilty plea conditioned on a false promise "cannot stand," *Mabry*, 467 U.S. at 509, regardless whether defense counsel objects when the promise is abandoned and the plea becomes involuntary, and regardless whether the reviewing court walks through each step of plain-error review to reach that inevitable conclusion.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings consistent with Fifth Circuit precedent.

Respectfully submitted,

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

November 17, 2008

RESPONDENT'S BRIEF

No. 07-9712

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN PUCKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly applied the plain-error standard to petitioner's forfeited claim that the government breached his plea agreement.

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-9712

JAMES BENJAMIN PUCKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 505 F.3d 377.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on December 4, 2007 (Pet. App. 2). The petition for a writ of certiorari was filed on March 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Petitioner was sentenced to consecutive terms of 262 months of imprisonment on the bank robbery count and 84 months of imprisonment on the firearm count, to be followed by three years of supervised release. Petitioner also was ordered to pay $4275 in restitution. The court of appeals affirmed. Pet. App. 1.

1. On April 4, 2002, petitioner entered Guaranty Bank in Dallas, Texas, approached two tellers, and placed a handwritten note on the counter. The note stated that petitioner was robbing the bank and instructed the tellers not to trigger an alarm or give petitioner trackers or dye packs. One of the tellers moved to assist her colleague, and petitioner pointed a chrome handgun at the moving teller. The second teller handed petitioner $4275 in currency. Petitioner took the money and left the bank. Gov't C.A. Br. 3-4.

2. In July 2002, a grand jury in the Northern District of Texas returned a two-count indictment charging petitioner with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and

use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Gov't C.A. Br. 2.

a. On September 3, 2003, the parties filed a written plea agreement in the district court. The agreement provided that petitioner would enter guilty pleas to both counts of the indictment. Plea Agrmt. ¶ 2. The plea agreement also provided that the "government agrees that [petitioner] has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." Id. ¶ 8. On September 4, 2003, the government filed a motion requesting that petitioner's offense level be decreased by a third level for acceptance of responsibility pursuant to Section 3E1.1(b) of the Sentencing Guidelines. In the motion, the government indicated that it "reserve[d] the right to withdraw" its request if petitioner engaged in conduct inconsistent with his acceptance of responsibility. 9/4/03 Mot. 1-2. No equivalent term appeared in the plea agreement, however.

b. On September 18, 2003, petitioner entered guilty pleas pursuant to the plea agreement. The prosecutor orally recited the terms of the plea agreement, including the government's "agree[ment] that [petitioner] has demonstrated acceptance of responsibility and thereby would qualify for a three level reduction in his offense level." 9/18/03 Tr. 9. An initial presentence report (PSR) dated October 30, 2003, indicated that

petitioner had "clearly demonstrated acceptance of responsibility for his offense" and recommended a three-level downward adjustment under Sentencing Guidelines § 3E1.1, which would result in a total offense level of 31. 10/30/03 PSR ¶ 37. With a criminal history category of VI, the original PSR calculated petitioner's Guidelines range of imprisonment as 188 to 235 months on count 1. Id. ¶ 128. On count 2, petitioner faced a mandatory consecutive term of at least seven years. Ibid.

c. Before sentencing, petitioner suffered a seizure and was diagnosed with a benign brain tumor, which was surgically removed. Sentencing was postponed numerous times. On the defense's motion, the district court also ordered physical and neurological evaluations to determine petitioner's past and present mental capacity. Pet. App. 1 at 1. The resulting reports were filed with the district court. Gov't C.A. Br. 5-6.

On September 27, 2005, petitioner filed a pro se pleading asserting that his counsel had rendered ineffective assistance in failing to pursue a diminished-capacity or mental-defect defense. Gov't C.A. Br. 6. On November 8, 2005, petitioner filed a pro se motion to withdraw his guilty plea alleging, among other things, that his brain tumor and "bipolar disorder" had rendered him incompetent to plead guilty. Id. at 6-7; Pet. App. 1 at 1. On March 20, 2006, the district court denied both motions. Gov't C.A. Br. 7; Pet. App. 1 at 1. The court noted that petitioner had never

been diagnosed with bipolar disorder and that the court-ordered evaluations had revealed no evidence that petitioner was incompetent; the reports instead were "replete with findings of rationality." Gov't C.A. Br. 8; Pet. App. 1 at 1.

d. Because of the delay in petitioner's sentencing, the district court ordered the probation officer to update the original PSR. Pet. App. 1 at 2. On March 31, 2006, the probation officer interviewed petitioner in his attorney's presence. 4/6/06 PSR Supp. Addendum ¶ 26a. Petitioner admitted that in February 2005, while he was in custody pending sentencing in this case, he had assisted another inmate to defraud the United States Postal Service and had received $300 from the scheme. Ibid. The probation officer adjusted her original Guidelines calculation to recommend that petitioner receive no reduction in his offense level for acceptance of responsibility. Id. ¶ 26b; Pet. App. 1 at 2. The probation officer recalculated petitioner's total offense level as 34. 4/6/06 PSR Supp. Addendum ¶ 38. Petitioner's Guidelines range of imprisonment on Count 1, as calculated in the amended PSR, was 262 to 300 months. Id. ¶ 128.

e. At sentencing, defense counsel objected to the PSR on the ground that it incorrectly denied petitioner credit for acceptance of responsibility. 5/4/06 Tr. 4. Defense counsel noted that the government had "filed a motion to allow [petitioner] to have acceptance of responsibility" and that petitioner had "previously

accept[ed] responsibility by entering a plea of guilty." Ibid. The prosecutor responded that the government's motion for a reduction in petitioner's offense level for acceptance of responsibility "was made a long time ago" and predated the new offense that had been reported in the amended PSR. Id. at 5. Based on the new offense, the prosecutor "object[ed] to [petitioner] receiving any acceptance of responsibility levels at this point." Ibid. Defense counsel responded that the court retained discretion to award petitioner credit for acceptance of responsibility, but he did not assert that the government's objection breached the plea agreement. Id. at 6. The district court observed that even if it retained discretion to award petitioner credit for acceptance of responsibility, it was "so rare [as] to be unknown around here" that such credit would be given when a defendant has committed a new crime. Ibid.[1] The court ruled that it would not award petitioner credit for acceptance of responsibility "under the circumstances here." Id. at 36. The court sentenced petitioner to 262 months of imprisonment on the bank robbery count and a consecutive term of 84 months of

---

[1] The application note to Sentencing Guidelines § 3E1.1 provides that a defendant's "voluntary termination or withdrawal from criminal conduct or associations" is one of a non-exhaustive list of factors that a district court may appropriately consider in deciding whether to award credit for acceptance of responsibility. Guidelines § 3E1.1, comment. (n.1) (2002).

imprisonment on the firearm count, to be followed by three years of supervised release. Id. at 43-45.

3. On appeal, petitioner argued, inter alia, that the government had breached the plea agreement by opposing a reduction in petitioner's offense level for acceptance of responsibility. Pet. App. 1 at 3. The government conceded that "the prosecutor's objection at sentencing to [petitioner] receiving a reduction for acceptance of responsibility was contrary to the government's obligation as stated in the Plea Agreement." Gov't C.A. Br. 21. But the government argued that petitioner's claim of a government breach, which was being raised for the first time on appeal, was subject to review under the plain-error standard. Ibid. The government asserted that petitioner could not meet that standard because he could not demonstrate that the government's breach (1) affected his substantial rights or (2) seriously affected the fairness, integrity, or public reputation of judicial proceedings. Id. at 21-26.

The court of appeals affirmed. Pet. App. 1. The court held that petitioner forfeited his claim of a government breach by failing to object on that ground in the district court. Id. at 3. The court explained that Fifth Circuit precedent contained some inconsistencies on how to apply the plain-error standard in the context of an alleged government breach of a plea agreement. Ibid. The court rejected the suggestion in some decisions that a

government breach always constitutes reversible plain error. Id. at 3-5 & n.7 (citing, e.g., United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992)). The court held that petitioner "must establish the elements of plain error and show prejudice before this court can correct a forfeited error." Id. at 3 (citing United States v. Calverley, 37 F.3d 160, 162-164 (5th Cir. 1994) (en banc), cert. denied, 513 U.S. 1196 (1995), abrogated in part on other grounds by Johnson v. United States, 520 U.S. 461, 468 (1997)).

The court of appeals determined that, in this case, "the first two prongs" of the plain-error standard were met. Pet. App. 1 at 5. The court found, first, that "[t]here was error, as the government concede[d] that its objection at sentencing to the reduction for acceptance of responsibility 'contradicted the terms of the plea agreement.'" Ibid. The court also found that the error was obvious. Ibid. But the court held that petitioner had "not carried his burden of showing prejudice." Ibid. The court noted that it was "clear that the court denied [petitioner] a reduction because he admitted he committed another crime while in custody." Ibid. The court held that petitioner "made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility." Ibid. In fact, the court observed, "[t]he record indicate[d] exactly the opposite."

Ibid. Accordingly, the court found "no plain error warranting reversal." Ibid.

DISCUSSION

Petitioner contends (Pet. 6-11) that the court of appeals "violated" Santobello v. New York, 404 U.S. 257 (1971), by applying the plain-error standard to petitioner's forfeited claim that the government breached his plea agreement. Petitioner also contends (Pet. 12-16) that if the plain-error standard applies to this case, it requires a less onerous demonstration of prejudice than is demanded in a "conventional application" of the plain-error standard under Federal Rule of Criminal Procedure 52(b). Petitioner argues (Pet. 15) that if a "modified" plain-error standard had been applied in his case, the outcome would have been a remand for vacation of his plea or resentencing.

The court of appeals correctly applied the plain-error standard to petitioner's forfeited claim, and the court also correctly held that petitioner was not entitled to relief under that standard because he failed to demonstrate that his substantial rights were affected by the government's breach of the plea agreement. We agree with petitioner, however, that there is a conflict among the courts of appeals on whether the plain-error standard applies to a forfeited claim that the government breached a plea agreement, as well as on how the plain-error standard should be applied in that context. Because the applicable standard of

review in the plea-breach context is an important and recurring issue in the conduct of federal prosecutions, and because the question is squarely presented in this case, this Court's review is warranted.[2]

1. The court of appeals correctly held that petitioner forfeited his claim that the government breached his plea agreement by failing to object at the time the breach occurred, i.e., at petitioner's sentencing hearing in the district court. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" United States v. Olano, 507 U.S. 725, 731 (1993) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)); accord United States v. Cotton, 535 U.S. 625, 631 (2002); Peretz v. United States, 501 U.S. 923, 936-937 (1991); United States v. Frady, 456 U.S. 152, 162-163 (1982); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-239 (1940).

---

[2] The court of appeals stated that "both parties agree that some form of plain error analysis is appropriate," but its ensuing discussion makes clear that petitioner asked the court to "apply a rule of per se reversal any time the government breaches a plea agreement." Pet. App. 1 at 3. Thus, the parties effectively took opposite positions on the applicability of the plain-error rule, and, in any event, the court of appeals squarely passed on that issue, such that it is properly presented here. See United States v. Williams, 504 U.S. 36, 41 (1992).

That principle is embodied in Federal Rule of Criminal Procedure 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under Rule 52(b), an appellate court may correct a forfeited error only if the court finds, first, an "error," that is, a "[d]eviation from a legal rule" that has not been waived. Olano, 507 U.S. at 732-733. Second, the court must find that the error is "plain," meaning it is clear or obvious. Id. at 734. Third, the court must conclude that the plain error "affected substantial rights," which ordinarily requires a showing by the defendant that the error "affected the outcome of the district court proceedings." Ibid. Last, "Rule 52(b) is permissive, not mandatory." Id. at 735. Thus, when the first three requirements are satisfied, "the court of appeals has authority to order correction, but is not required to do so." Ibid. At that discretionary stage, the court of appeals "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Id. at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

Because petitioner failed to bring his claim that the government breached the plea agreement to the attention of the district court, the claim is subject to the demands of Rule 52(b). The first two requirements of the rule are satisfied. The

government's assertion at sentencing that petitioner did not qualify for a downward adjustment in his offense level for acceptance of responsibility breached the written plea agreement in which the government stipulated that petitioner did so qualify.[3] The breach was also obvious. But the court of appeals correctly held that petitioner is not entitled to relief under Rule 52(b) because he cannot show that the error affected his substantial rights. The record persuasively demonstrates that the outcome of the proceeding would have been the same -- i.e., petitioner would have received the same sentence, which did not incorporate a Guidelines adjustment for acceptance of responsibility -- if the

---

[3] The government's position at sentencing responded to petitioner's post-plea misconduct, which was not anticipated at the time the plea agreement was entered. The prosecutor correctly recognized that new criminal conduct by a defendant awaiting sentencing must weigh heavily against an award of credit for acceptance of responsibility under Guidelines § 3E1.1. As the government conceded in the court of appeals, however, notwithstanding those considerations, the prosecutor's position at sentencing constituted a breach of the plea agreement. A prosecutor retains an obligation of candor to the court to inform the court of relevant information at sentencing, even if that information may undercut commitments in a plea agreement. But the prosecutor "must discharge both duties conscientiously." United States v. Saxena, 229 F.3d 1, 6 (1st Cir. 2000) (prosecution did not breach plea agreement by providing court with post-plea information undercutting acceptance of responsibility while standing by plea agreement). Here, the probation officer had already informed the court about petitioner's post-plea activities, and the prosecutor's position at sentencing was directly at odds with the commitment in the plea agreement. Plea Agrmt. ¶ 8 (stating that petitioner "qualified" for acceptance of responsibility credit). Although the government could have drafted petitioner's plea agreement to condition the government's obligations on the defendant's abstention from further criminal conduct, it did not do so.

government's breach had not occurred. As the district court noted, it was "so rare [as] to be unknown" that a defendant would receive sentencing credit for acceptance of responsibility when he committed new crimes while awaiting sentencing. 5/4/06 Tr. 6. On that record, petitioner cannot carry his burden of demonstrating that the government's breach resulted in prejudice to him.

The court of appeals had no need to address the final requirement of plain-error review, but that additional prerequisite to relief supports the court's holding. It was undisputed in the district court that petitioner committed a new crime before he was sentenced -- petitioner admitted to the post-plea misconduct -- and it was beyond dispute that continued criminal conduct negates acceptance of responsibility. The government's failure to fulfill its promise to recommend a favorable Guidelines adjustment for acceptance of responsibility, in circumstances where petitioner eliminated the factual premise on which the promise implicitly was based, does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Cf. Cotton, 535 U.S. at 633 (omission of drug quantity from indictment did not seriously affect fairness, integrity, or public reputation of judicial proceedings where evidence supporting drug quantity was overwhelming and essentially uncontroverted); United States v. Branam, 231 F.3d 931, 933 (5th Cir. 2000) (assuming that prosecutor's comment at sentencing breached plea agreement and satisfied first three

requirements of plain-error standard, relief was not warranted because the plain error did not affect the fairness, integrity, or public reputation of the judicial system; defendant failed to comply with plea agreement's "wholly reasonable and specific procedures" for determining whether a breach had occurred and for affording the breaching party a reasonable opportunity to explain or cure the breach).

Petitioner argues (Pet. 9-11) that application of the plain-error standard to his forfeited claim violates principles this Court announced in Santobello, 404 U.S. 257. In Santobello, the Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262. Application of the plain-error standard to petitioner's claim does not conflict with Santobello. Santobello involved a state prosecutor's breach of an agreement to "make no recommendation as to the [defendant's] sentence," id. at 258, and defense counsel "immediately objected" on breach-of-plea grounds when the prosecutor (who was not the prosecutor who negotiated the plea agreement) recommended at sentencing that the defendant receive the maximum one-year term, id. at 259. Because Santobello involved preserved error and emerged from a state court, where Rule 52(b) does not apply, the Court had no occasion to address the standard of review that would have applied in the

federal system if, as in this case, the claim of error had been forfeited. See In re Sealed Case, 356 F.3d 313, 316 (D.C. Cir.) (plea-breach claim in Santobello was preserved by an objection in the trial court; Santobello "[i]n no way" dictates the standard of review in a case of forfeited error), cert. denied, 543 U.S. 885 (2004); see also United States v. D'Iquillont, 979 F.2d 612, 614 (7th Cir. 1992) (Santobello "is predicated upon a defendant's proper objection to the government's alleged breach"), cert. denied, 507 U.S. 1040 (1993).

In this federal case, Rule 52(b) governs, and that rule does not limit the types of forfeited claims to which plain-error review applies. See United States v. Vonn, 535 U.S. 55, 62 (2002) (plain-error standard of Rule 52(b) "cover[s] issues not raised before the district court in a timely way"); Johnson v. United States, 520 U.S. 461, 466-467 (1997) (the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure; Court lacks authority to make exceptions to Rule 52(b)); Pequero v. United States, 526 U.S. 23, 29 (1999) ("Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.") (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 254-255 (1988)).

It is true, as the court of appeals observed, that "a plea agreement implicates a defendant's constitutional rights" and the government should not be allowed to induce a defendant to waive his rights through attractive terms of agreement and then violate the agreement with impunity. Pet. App. 1 at 4-5. But when a defendant fails to alert the district court and the government of his concern that the agreement is being breached -- through an objection that would permit resolution of that issue, and possibly a final resolution of the issue in the defendant's favor, in the district court -- it is not unfair to require the defendant, as with every other forfeited claim, to meet the plain-error standard in order to receive relief in the court of appeals. Ibid. The core purpose of the contemporaneous-objection requirement -- to bring alleged errors to the attention of the decisionmaker best suited to evaluate them and correct them if necessary -- applies fully to an asserted breach of a plea agreement:

> [A]n alleged breach of the plea agreement is precisely the type of claim that a district court is best situated to resolve. The claim is fact-specific, [it] may require an evidentiary hearing or proffer of evidence, and the trial court, having taken the plea and having heard the evidence, should have the first opportunity to rule. A claim of breach of the plea agreement is not generally one which the passage of time may illuminate, but rather is the sort of claim which a defendant ordinarily will recognize immediately and should be required to raise when the alleged breach can still be repaired.

United States v. Flores-Payon, 942 F.2d 556, 560 (9th Cir. 1991); see also In re Sealed Case, 356 F.3d at 319 (applying plain-error

standard to plea-breach claim when the defendant had "the opportunity and knowledge to object" in the district court is "totally consistent with the anti-sandbagging philosophy of the Federal Rules"); United States v. Pryor, 957 F.2d 478, 482 (7th Cir. 1992) (observing that alleged government breach "would have been easily cured" if a timely objection had been made at sentencing).

In this case, if petitioner had objected during the sentencing hearing to the prosecutor's recommendation against an acceptance-of-responsibility adjustment, the district court and the parties could have consulted the pertinent term of the plea agreement and the prosecutor, refreshed on the substance of that term, might have corrected her position. The need for appellate consideration of the issue may have been eliminated. See United States v. Amico, 416 F.3d 163, 165 (2d Cir. 2005) (government's retraction of argument made in sentencing memorandum in violation of plea agreement adequately cured the breach where original statement was in a "mild, brief, and unassertive form" and retraction was rapid). Petitioner's failure to object deprived the district court of a clear opportunity to correct the error as it occurred. The court of appeals correctly applied the plain-error standard of Rule 52(b) to petitioner's claim and correctly determined that petitioner failed to meet that standard. See Vonn, 535 U.S. at 73 (under the plain-error rule, which serves the value of finality, "the

defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on").

2. Although the court of appeals correctly resolved petitioner's case, petitioner is correct (Pet. 6-8) that the courts of appeals are divided on the question whether a claim that the government breached a plea agreement is subject to the plain-error standard when it is raised for the first time on appeal. The majority of the courts of appeals have concluded, as the court did here, that such a claim is reviewable only for plain error. See In re Sealed Case, 356 F.3d at 316-319; United States v. Saxena, 229 F.3d 1, 5 (1st Cir. 2000); United States v. Fant, 974 F.2d 559, 562 (4th Cir. 1992); United States v. Barnes, 278 F.3d 644, 646 (6th Cir. 2002); United States v. Matchopatow, 259 F.3d 847, 851 (7th Cir. 2001); United States v. Cohen, 60 F.3d 460, 462-463 (8th Cir. 1995); Flores-Payon, 942 F.2d at 558-560; United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000). Other courts of appeals have concluded that a plea-breach claim may be remedied on appeal without satisfying the plain-error standard, and thus without a demonstration of "obvious" error or prejudice, even when no objection was raised in the district court. See United States v. Griffin, 510 F.3d 354, 360 (2d Cir. 2007); United States v. Rivera, 357 F.3d 290, 293-295 (3d Cir. 2004); United States v. Peterson, 225 F.3d 1167, 1170 (10th Cir. 2000), cert. denied, 531 U.S. 1131 (2001).

As the court of appeals noted in In re Sealed Case, the "few cases in the minority offer no convincing reasoning" for exempting plea-breach claims from plain-error review. 356 F.3d at 318. The Third Circuit justified its differential treatment of such claims by reference to certain "additional principles" present in the plea-agreement context, such as the principle that "[b]reach of a plea agreement by a prosecutor [] strikes at public confidence in the fair administration of justice" and that the government "has an obligation to adhere strictly to the terms of the bargain it strikes with defendants." Rivera, 357 F.3d at 294 (internal quotation marks and citations omitted). Those principles, however, address the arguable consequences of a government breach that has been established, not whether a defendant's allegation of a breach -- like all other claims that error occurred at a plea proceeding, trial, or sentencing -- is subject to plain-error review if no contemporaneous objection was made in the district court. See Johnson, 520 U.S. at 466 ("the seriousness of the error claimed does not remove consideration of it from the ambit of" Rule 52(b)).

Petitioner also is correct (Pet. 12-15) that analytical variations exist even among the circuits that have held that plain-error review applies to forfeited plea-breach claims. Some courts appear to find that the plain-error standard will be met in any case in which a government breach is established, because such a breach "serve[s] not only to violate the constitutional rights of

the defendant, but directly involve[s] 'the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.'" Fant, 974 F.2d at 565 (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)); see also United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997); Barnes, 278 F.3d at 648. Reaching that conclusion in every case of a breach omits crucial steps in the plain-error analysis, however. Before addressing whether a government breach of a plea agreement should be remedied on appeal because it affected the integrity of judicial proceedings -- which is the fourth component of the plain-error standard as articulated by this Court in Olano, 507 U.S. at 735-736 -- the reviewing court must first find that the second and third components of the plain-error standard are met, that is, that the government breach was "plain" or obvious and that the defendant has demonstrated that the outcome of the proceeding was affected by the breach. Id. at 734-735. To the extent that some courts purport to apply plain-error analysis to forfeited plea-breach claims but fail to demand that the defendant demonstrate the plainness of the error and its effect on substantial rights, their approach conflicts with this Court's binding interpretation of the requirements of Rule 52(b).

In sum, the courts of appeals disagree on whether the plain-error standard applies to forfeited claims that the government has

breached a plea agreement. And the courts of appeals that accept the applicability of the plain-error standard in the plea-breach context apply the standard in ways that differ from each other and, in some cases, conflict with this Court's precedent. Because these issues arise repeatedly in the federal courts, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

AUGUST 2008

RESPONDENT'S BRIEF

12-22-08

114 (4)

No. 07-9712

Supreme Court, U.S.
FILED
DEC 17 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

JAMES BENJAMIN PUCKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA H. SCHERTLER
Assistant to the Solicitor General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BOTH 45[illegible]

QUESTION PRESENTED

Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Rules involved 1
Statement 2
Summary of argument 12
Argument 15
I. The plain-error standard of Federal Rule of Criminal Procedure 52(b) applies to forfeited plea-breach claims 16
A. Rule 52(b) applies to all direct appeals of criminal cases in the federal system 16
B. The policies of Rule 52(b) are served in the context of forfeited plea-breach claims 18
II. Petitioner's arguments for exempting plea-breach claims from Rule 52(b) are without merit 26
A. A deviation by the government from the terms of a plea agreement does not necessarily vitiate the voluntariness of the guilty plea 26
B. The contemporaneous objection requirement applies equally when a waiver of trial rights is at issue 31
C. There is no functional impediment to applying the plain-error standard to plea-breach claims 33
D. A plea-breach claim raised for the first time on appeal may be barred by the discretionary component of plain-error review 39
III. The government's breach of the plea agreement in this case was not reversible plain error 41
A. Petitioner cannot demonstrate that the government's breach of the plea agreement affected his substantial rights 42

Table of Contents—Continued: Page

B. Petitioner cannot demonstrate that the government's breach of the plea agreement seriously affected the fairness, integrity, or public reputation of judicial proceedings 43
Conclusion 45
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Arnett, In re, 804 F.2d 1200 (11th Cir. 1986) 21
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 35
Blackledge v. *Allison*, 431 U.S. 63 (1977) 19
Bousley v. *United States*, 523 U.S. 614 (1998) 33
Bradshaw v. *Stumpf*, 545 U.S. 175 (2005) 27
Brady v. *United States*, 397 U.S. 742 (1970) 19, 27
Harris v. *Rivera*, 454 U.S. 339 (1981) 22
Henderson v. *Morgan*, 426 U.S. 637 (1976) 32, 33
Hill v. *Lockhart*, 474 U.S. 52 (1985) 36
Johnson v. *United States*, 520 U.S. 461 (1997) 15, 17, 19, 31, 40
Jones v. *United States*, 527 U.S. 373 (1999) 35
Luce v. *United States*, 469 U.S. 38 (1984) 18
Mabry v. *Johnson*, 467 U.S. 504 (1984) 28
McCarthy v. *United States*, 394 U.S. 459 (1969) 19
Murray v. *Carrier*, 477 U.S. 478 (1986) 33
Neder v. *United States*, 527 U.S. 1 (1999) 22, 35
Nguyen v. *United States*, 539 U.S. 69 (2003) 33, 34, 35

Cases—Continued: Page

Paradiso v. *United States*, 689 F.2d 28 (2d Cir. 1982) ... 29
Peretz v. *United States*, 501 U.S. 923 (1991) 16
Santobello v. *New York*, 404 U.S. 257 (1971) ..... *passim*
Sealed Case, In re, 356 F.3d 313 (D.C. Cir.), cert. denied, 543 U.S. 885 (2004) 24, 39
Strickland v. *Washington*, 466 U.S. 668 (1984) 36
United States v. *Amico*, 416 F.3d 163 (2d Cir. 2005) 22, 38
United States v. *Atkinson*, 297 U.S. 157 (1936) ... 18, 41, 43
United States v. *Branam*, 231 F.3d 931 (5th Cir. 2000) 44
United States v. *Brody*, 808 F.2d 944 (2d Cir. 1986) 27, 29
United States v. *Busche*, 915 F.2d 1150 (7th Cir. 1990) 18
United States v. *Calverley*, 37 F.3d 160 (5th Cir. 1994), cert. denied, 513 U.S. 1196 (1995) 10
United States v. *Cerverizzo*, 74 F.3d 629 (5th Cir. 1996) 11
United States v. *Cotton*, 535 U.S. 625 (2002) 16, 17, 43
United States v. *D'Iguillont*, 979 F.2d 612 (7th Cir. 1992) 36
United States v. *Dominguez Benitez*, 542 U.S. 74 (2004) 18, 32, 36, 37
United States v. *Flores-Payon*, 942 F.2d 556 (9th Cir. 1991) 20
United States v. *Flores-Sandoval*, 94 F.3d 346 (7th Cir. 1996) 36
United States v. *Frady*, 456 U.S. 152 (1982) 16, 17

Cases—Continued: Page

United States v. *Goldfaden*, 959 F.2d 1324 (5th Cir. 1992) 10
United States v. *Hyde*, 520 U.S. 670 (1997) 40
United States v. *Jensen*, 423 F.3d 851 (8th Cir. 2005) ... 37
United States v. *Munoz*, 408 F.3d 222 (5th Cir. 2005) ... 11
United States v. *Olano*, 507 U.S. 725 (1993) 11, 16, 17, 35, 41, 43
United States v. *Pryor*, 957 F.2d 478 (7th Cir. 1992) 21
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 16
United States v. *Vaval*, 404 F.3d 144 (2d Cir. 2005) 29
United States v. *Vonn*, 535 U.S. 55 (2002) ..... *passim*
United States v. *Young*, 470 U.S. 1 (1985) 16, 43
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 18
Williams v. *United States*, 503 U.S. 193 (1992) 37
Yakus v. *United States*, 321 U.S. 414 (1944) 16

Constitution, statutes, rules and guidelines:

U.S. Const. Art. III 34
18 U.S.C. 641 7
18 U.S.C. 924(c)(1) 2, 3
18 U.S.C. 924(c)(1)(A)(ii) 6
18 U.S.C. 924(c)(1)(D)(ii) 6
18 U.S.C. 2113(a) 2, 3
18 U.S.C. 2113(d) 2, 3
28 U.S.C. 292(a) 34
Fed. R. Crim. P.:
Rule 11 ..... 12, 19, 20, 24, 36

Statutes, rules and guidelines—Continued: Page

Rule 11(a)(2) 19
Rule 11(b)(1) 19
Rule 11(c) 19
Rule 11(c)(1)(C) 29
Rule 11(c)(3)-(5) 19
Rule 11(c)(4) 29
Rule 11(d) 13, 25
Rule 11(d)(2) 20
Rule 11(d)(2)(B) 20, 21, 23, 25
Rule 11(e) 13, 25
Rule 11(h) 24
Rule 32 advisory committee's note (2002) (Amendment) 25
Rule 32(e) (2000) 25
Rule 35 29
Rule 52 27
Rule 52(b) ..... *passim*
United States Sentencing Guidelines:
§ 2B3.1(b)(1) 5
§ 3E1.1 ..... 6, 9
§ 3E1.1, comment. (n.1(b)) 9, 41
§ 3E1.1, comment. (n.4) 30, 31
§ 3E1.1(a) 3
§ 3E1.1(b) 3, 4, 5
§ 4A1.1(d) 6
§ 4A1.1(e) 6
§ 4B1.1 6

Miscellaneous:

Roger Traynor, *The Riddle of Harmless Error* (1970) 40

In the Supreme Court of the United States

No. 07-9712

JAMES BENJAMIN PUCKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 505 F.3d 377.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on December 4, 2007 (Pet. App. 2). The petition for a writ of certiorari was filed on March 3, 2008, and was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

The relevant provisions of the Federal Rules of Criminal Procedure are reprinted in an appendix (App., *infra*, 1a-7a) to this brief.

STATEMENT

Following a guilty plea entered pursuant to a written agreement with the government, petitioner was convicted in the United States District Court for the Northern District of Texas of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). J.A. 49a-50a, 62a, 65a. Petitioner was sentenced to consecutive terms of 262 months of imprisonment on the bank robbery count and 84 months of imprisonment on the firearm count, to be followed by three years of supervised release. Pet. App. 1, at 2; J.A. 35a. On appeal, petitioner asserted for the first time that the government had breached the plea agreement at sentencing. Pet. App. 1, at 3. The court of appeals applied the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure to petitioner's forfeited claim and affirmed. *Id.* at 3-5.

1. On April 4, 2002, petitioner entered Guaranty Bank in Dallas, Texas, approached two tellers, and placed a handwritten note on the counter. The note stated that petitioner was robbing the bank and instructed the tellers not to trigger an alarm or give petitioner trackers or dye packs. One of the tellers moved to assist her colleague, and petitioner pointed a chrome handgun at the moving teller. The second teller handed petitioner $4275 in currency. Petitioner took the money and left the bank. J.A. 72a.

On April 8, 2002, petitioner was arrested in Nevada on a supervised release violator's warrant. After his arrest, petitioner admitted that he had robbed the Guaranty Bank four days earlier using a chrome .22-caliber revolver. J.A. 138a.

2. In July 2002, a grand jury in the Northern District of Texas returned a two-count indictment charging petitioner with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). J.A. 49a-50a. Petitioner was appointed counsel and pleaded not guilty. J.A. 8a.

3. On September 3, 2003, the parties filed a written plea agreement in the district court. J.A. 14a, 51a-56a. The agreement provided that petitioner would enter guilty pleas to both counts of the indictment. J.A. 52a. The agreement also enumerated the trial rights that petitioner would waive by pleading guilty. J.A. 51a-52a. The agreement specified the maximum penalties that were authorized by the applicable criminal statutes and provided that petitioner would not be permitted to withdraw his plea if the applicable sentencing range under the Sentencing Guidelines was higher than he expected or if the district court departed from the applicable range. J.A. 52a-53a.

The plea agreement provided that the "government agrees that [petitioner] has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." J.A. 54a; see Sentencing Guidelines § 3E1.1(a) and (b).[1] The government also

---

[1] Section 3E1.1(a) of the Sentencing Guidelines authorizes a two-level reduction in offense level if a defendant "clearly demonstrates acceptance of responsibility for his offense." Sentencing Guidelines § 3E1.1(a). Section 3E1.1(b) authorizes a further one-level reduction, on motion of the government, for a defendant whose offense level is 16 or greater and who has "assisted authorities in the investigation or prosecution of his own misconduct" by timely providing information to the authorities or timely notifying authorities of his intention to enter a guilty plea. *Id.* § 3E1.1(b).

"agree[d] to request that [petitioner's] sentence be placed at the lowest end of the guideline level deemed applicable by" the district court. J.A. 54a.

4. On September 4, 2003, the government filed a motion requesting that petitioner's offense level be decreased by a third level for acceptance of responsibility under Section 3E1.1(b) of the Sentencing Guidelines. J.A. 57a-59a. The government "reserved[d] the right to withdraw" its request if petitioner engaged in conduct inconsistent with his acceptance of responsibility. J.A. 58a. No equivalent term appeared in the plea agreement, however. See J.A. 51a-56a.

5. On September 18, 2003, petitioner entered a guilty plea pursuant to the plea agreement. J.A. 60a-74a. At the plea proceeding, the district court informed the parties that it possessed a copy of the plea agreement, which had been signed by the prosecutor, petitioner, and his attorney. J.A. 65a. Petitioner and his counsel confirmed that they had signed the agreement and approved of its contents. J.A. 66a.[2] At the court's request, the prosecutor orally summarized all the terms of the plea agreement, J.A. 67a-69a, including the government's "agree[ment] that [petitioner] has demonstrated acceptance of responsibility and thereby would qualify for a three level reduction in his offense level," J.A. 68a. Petitioner and his counsel each orally affirmed that the prosecutor's summary of the plea agreement was correct. J.A. 69a. The district court then reviewed several terms of the agreement again and confirmed that peti-

---

[2] Petitioner clarified with the district court that the plea agreement would permit him to "possibly appeal [based on] ineffective assistance of [his] previous counsel." J.A. 66a. Petitioner had no other questions about the plea agreement and asked the court to accept the agreement. J.A. 66a-67a.

tioner and his counsel had discussed those terms. J.A. 69a-71a. Petitioner orally affirmed that he wanted the court to accept the plea agreement. J.A. 71a.

The district court also possessed a copy of the factual resume that had been filed with the plea agreement. J.A. 71a. The court noted that the factual resume identified the elements of both offenses with which petitioner was charged. *Ibid.* At the court's request, the prosecutor recited the factual statement. J.A. 71a-72a. Petitioner confirmed that he had signed the factual statement and that it was accurate. J.A. 73a. The district court accepted petitioner's guilty plea after finding that petitioner was entering the plea intelligently and voluntarily and that the stipulated facts supported the plea. *Ibid.*

6. a. On October 30, 2003, an initial presentence report (PSR) was filed. J.A. 129a-192a. The PSR recited all of the terms of petitioner's plea agreement, J.A. 134a-135a, including the government's "agree[ment] that [petitioner] has demonstrated acceptance of responsibility and qualifies for a 3 level reduction in his offense level," J.A. 135a. The PSR also summarized the government's written motion supporting petitioner's qualification for a third offense-level reduction under Sentencing Guidelines § 3E1.1(b). J.A. 140a. The PSR noted that at sentencing, "the government will formally move the Court to grant the additional 1 level reduction." J.A. 140a-141a.

The PSR calculated petitioner's base offense level as 20 and his total offense level as 31. J.A. 142a-143a. The total offense level included a two-level increase under Sentencing Guidelines § 2B3.1(b)(1) based on petitioner's robbery of a financial institution. J.A. 142a. The offense level was further increased because peti-

tioner qualified as a career offender under Sentencing Guidelines § 4B1.1.[3] J.A. 143a. The PSR recommended that petitioner receive a three-level downward adjustment in his offense level under Sentencing Guidelines § 3E1.1 because he had "clearly demonstrated acceptance of responsibility for his offense." J.A. 143a. The PSR calculated petitioner's criminal history category as VI; petitioner received additional criminal history points because he had committed his new offenses while on supervised release and parole in certain cases, and within two years of his completion of sentences in other cases. J.A. 168a-169a; see Sentencing Guidelines § 4A1.1(d) and (e). Petitioner's Sentencing Guidelines range of imprisonment on Count 1, as calculated in the PSR, was 188 to 235 months. J.A. 186a. On Count 2, petitioner faced a mandatory consecutive term of at least seven years. *Ibid.*; see 18 U.S.C. 924(c)(1)(A)(ii) and (D)(ii).

b. Petitioner's sentencing was scheduled for December 18, 2003. J.A. 17a. In November 2003, however, petitioner experienced a seizure while in prison and was diagnosed with a brain tumor. J.A. 86a. The tumor was surgically removed in December 2003. J.A. 87a, 202a. Petitioner's sentencing was postponed numerous times over more than two years. J.A. 17a-24a, 29a-30a. The district court granted defense requests to have physical and neurological evaluations performed on petitioner to assess his past and present mental capacity. Pet. App. 1, at 1; J.A. 19a.

c. On September 27, 2005, two years after entering his guilty plea, petitioner filed a pro se pleading assert-

---

[3] Petitioner had 23 prior convictions, including felony convictions for forgery, drug possession, theft, and armed robbery. J.A. 144a-168a.

ing that his counsel had rendered ineffective assistance by failing to pursue a diminished-capacity or mental-defect defense. Pet. App. 1, at 1; J.A. 27a. On November 8, 2005, petitioner filed a pro se motion to withdraw his guilty plea alleging, among other things, that his brain tumor and a "bi-polar disorder" had rendered him incompetent to plead guilty. Pet. App. 1, at 1; J.A. 27a-28a. On March 20, 2006, the district court denied both motions. Pet. App. 1, at 1; J.A. 29a. The court noted that petitioner had never been diagnosed with bipolar disorder and that the court-ordered evaluations had revealed no evidence that petitioner was incompetent; the reports instead were "'replete' with findings of rationality." Pet. App. 1, at 1.

d. Because of the lengthy delay in petitioner's sentencing, the district court ordered an updated PSR. J.A. 29a. The probation officer had received information that in February 2005, while in custody pending sentencing in this case, petitioner had assisted Lyndon Drew Hames in a scheme to defraud the United States Postal Service. J.A. 199a. Hames had pleaded guilty in federal court in May 2005 to possession of stolen property of the United States of a value over $1000, in violation of 18 U.S.C. 641. J.A. 199a. The factual statement supporting his plea indicated that petitioner had "suggested" that Hames participate in the fraudulent scheme and had "sent Mr. Hames detailed written instructions on how to execute the scheme." *Ibid.* On March 31, 2006, the probation officer questioned petitioner in the presence of his attorney about his involvement with Hames. *Ibid.* Petitioner admitted to the probation officer that he told Hames of the scheme to defraud and had profited $300 from Hames's crime. *Ibid.*

On April 6, 2006, the probation officer completed a supplemental addendum to the PSR. J.A. 198a-203a. The supplemental addendum reported petitioner's post-plea criminal conduct and recommended that, as a result of that misconduct, petitioner receive no reduction in his offense level for acceptance of responsibility. J.A. 199a-200a. The probation officer recalculated petitioner's total offense level as 34. J.A. 200a. The Sentencing Guidelines range of imprisonment on Count 1, as recalculated in the amended PSR, was 262 to 300 months. *Ibid.*

e. Sentencing occurred on May 4, 2006. J.A. 75a-128a. The prosecutor, the defense attorney, and the district court judge were the same individuals who had participated in the plea proceeding 30 months earlier. J.A. 60a-61a, 75a-76a. Petitioner's counsel objected to the amended PSR's recommendation that petitioner be denied credit for acceptance of responsibility and noted that the government had "filed a motion to allow [petitioner] to have acceptance of responsibility" and that petitioner "did previously accept responsibility by entering a plea of guilty." J.A. 79a. The court indicated that it "want[ed] to hear from the government" and the probation officer on that issue. *Ibid.* The prosecutor responded that her motion for a third level of credit for acceptance of responsibility "was made a long time ago" and predated the new offense that petitioner had committed, according to the amended PSR. *Ibid.* The prosecutor "object[ed] to [petitioner] receiving any acceptance of responsibility levels at this point." *Ibid.* The court then asked whether the probation officer "ha[d] any comment on that." *Ibid.* The probation officer responded that the Sentencing Guidelines "prohibit[ed] any acceptance of responsibility" in light of petitioner's

new offense. J.A. 80a. Defense counsel interjected and asserted that petitioner's new offense had not been proved beyond a reasonable doubt and that, notwithstanding the new offense, the court retained discretion under the Sentencing Guidelines to award credit for acceptance of responsibility. *Ibid.*[4] Petitioner's counsel did not direct the court to paragraph 8 of the plea agreement or assert that the government's position at sentencing was a breach of the agreement. See *ibid.*

Responding to the arguments defense counsel *did* raise, the court "accept[ed] what [counsel] sa[id]" about the discretionary nature of the court's decision but observed that it was "so rare [as] to be unknown around here" that three points of acceptance-of-responsibility credit would be awarded to a defendant who has "committed a crime subsequent to the crime for which they appear before the court." J.A. 80a-81a. The court indicated "[t]entatively" that it would not award petitioner credit for acceptance of responsibility. J.A. 81a. Alluding to the plea agreement, the court added that it believed it had "a recommendation in here somewhere" that the court sentence petitioner "to the lower end of the guidelines." *Ibid.*[5] Defense counsel confirmed that the court was "correct," and the court indicated that it "intend[ed] to follow that" recommendation. *Ibid.*

---

[4] The application note to Sentencing Guidelines § 3E1.1 provides that a defendant's "voluntary termination or withdrawal from criminal conduct or associations" is one of a non-exhaustive list of factors that a district court may appropriately consider in deciding whether to award credit for acceptance of responsibility. Sentencing Guidelines § 3E1.1, comment. (n.1(b)).

[5] The government's agreement to recommend that petitioner be sentenced at the low end of the applicable Sentencing Guidelines range appeared in paragraph 9 of the plea agreement. J.A. 54a.

At the conclusion of the sentencing hearing, the district court denied petitioner's request for an acceptance-of-responsibility adjustment "under the circumstances here." J.A. 111a. The court accepted the Sentencing Guidelines range calculated in the amended PSR and sentenced petitioner to the low end of that range—262 months of imprisonment on the bank robbery count and a consecutive term of 84 months of imprisonment on the firearm count, to be followed by three years of supervised release. J.A. 111a, 117a, 119a. The court also ordered petitioner to pay $4275 in restitution to Guaranty Bank. J.A. 117a.

7. The court of appeals affirmed. Pet. App. 1. Among other things, the court rejected petitioner's claim that his "plea agreement [was] invalid because the government breached it." *Id.* at 3. The court noted that the government had "concede[d] that it breached the plea agreement at sentencing by opposing any reduction for acceptance of responsibility." *Ibid.* The court further observed that the parties agreed that petitioner had "forfeited this error" and that "some sort of plain error analysis [was] appropriate." *Ibid.* The court explained that petitioner had proposed "a rule of *per se* reversal any time the government breaches a plea agreement" and that the government "argue[d] that reversal is appropriate only if [petitioner] can make the necessary showing of prejudice." *Ibid.* The court agreed with the government and held that petitioner "must establish the elements of plain error and show prejudice before this court can correct a forfeited error." *Ibid.* (citing *United States* v. *Calverley*, 37 F.3d 160, 162-164 (5th Cir. 1994) (en banc), cert. denied, 513 U.S. 1196 (1995)).

The court noted that some of its cases (such as *United States* v. *Goldfaden*, 959 F.2d 1324 (5th Cir.

1992)), had "ostensibly" reviewed forfeited plea-breach claims for plain error but then had reversed convictions without applying the four components of plain-error review articulated by this Court in *United States* v. *Olano*, 507 U.S. 725 (1993), and applied by the Fifth Circuit in *Calverley*. Pet. App. 1, at 4. The court further noted that other Fifth Circuit cases (such as *United States* v. *Munoz*, 408 F.3d 222 (5th Cir. 2005)), "call[ed] for *per se* reversal any time the government breaches a plea agreement." Pet. App. 1, at 4. In both instances, the court explained, its precedents "did not consider the appellate court's limited authority to review forfeited error." *Ibid.*

Applying the plain-error standard to the facts of this case, the court of appeals determined, first, that "[t]here was error, as the government concede[d] that its objection at sentencing to the reduction for acceptance of responsibility 'contradicted the terms of the plea agreement.'" Pet. App. 1, at 5. The court also determined that "the error was obvious." *Ibid.* But as to "whether th[e] error affected a substantial right," the court held that petitioner had "not carried his burden of showing prejudice." *Ibid.* (citing *United States* v. *Cerverizzo*, 74 F.3d 629, 633 (5th Cir. 1996)). The court found it to be "clear that the [district] court denied [petitioner] a reduction because he admitted he committed another crime while in custody." *Ibid.* The court concluded that petitioner "ha[d] made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility." *Ibid.* In fact, the court observed, "[t]he record indicates exactly the opposite." *Ibid.* Accordingly, the court held that

petitioner failed to "establish plain error and [was] not entitled to relief on a forfeited objection." *Ibid.*

SUMMARY OF ARGUMENT

The plain-error standard of Rule 52(b) applies to forfeited claims of error raised on direct appeal in federal criminal cases. Because petitioner raised his plea-breach claim for the first time on appeal, Rule 52(b) governs this case. Petitioner cannot show, as he must to warrant relief under Rule 52(b), that the government's breach of the plea agreement at sentencing affected the outcome of the district court proceeding or seriously affected the fairness, integrity, or public reputation of judicial proceedings. The judgment of the court of appeals therefore should be affirmed.

I. It is a fundamental principle of appellate review that a claim of error can be forfeited if it is not raised in the district court. A defendant who fails to object at sentencing may still obtain relief on appeal, but he must establish that reversible plain error was committed. Under Rule 52(b), the party who raises a forfeited claim of error on appeal must demonstrate that an error occurred, that it was plain, and that it affected the party's substantial rights. If those requirements are satisfied, the court of appeals should not exercise discretion to correct the forfeited error unless the claimant also demonstrates that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The plain-error standard of Rule 52(b) applies to a forfeited claim that the government breached a plea agreement. The district court is well-situated to address a claim that a plea agreement has been breached because it presides over the guilty plea proceeding and because Rule 11 requires the district court to review and

approve the terms of any plea agreement. Raising a claim of a breach in the district court permits the court most familiar with the facts to investigate the claim and enforce the agreement if necessary, or grant alternative relief such as permitting a defendant to withdraw his plea. Those measures can obviate the need for appellate review.

If plea-breach claims were not subject to the plain-error standard, distorted incentives and gamesmanship would result. A defendant displeased with the sentence he received could then seek relief, including withdrawal of the guilty plea, in the appellate court without facing the heightened requirements of plain-error review. That would eliminate the incentive for a defendant to move to withdraw his guilty plea in the district court before sentencing (reflected in Rule 11(d) and (e)) based on an alleged government breach of the plea agreement.

II. Petitioner is incorrect that any deviation by the government from the terms of a plea agreement "necessarily vitiates" the voluntariness of the guilty plea and is inherently prejudicial. In many cases, a government breach will not prejudice the defendant, as when the government fails to fulfill a promise to recommend sentencing leniency but the defendant receives that leniency nonetheless. The same is true when the government breaches its agreement by standing silent, but even a favorable word from the government would not have made a difference. In such circumstances, a government breach cannot fairly be characterized as depriving the defendant of awareness and understanding of the consequences of his plea in violation of due process.

Contrary to petitioner's contentions, this Court's cases establish that plain-error principles apply to de-

faulted claims that relate to the validity of a defendant's waiver of trial rights. And not every breach of a plea necessarily satisfies the requirements for reversible plain error.

Whether a breached plea agreement affects substantial rights will depend on whether the error affected the outcome of the district court proceeding. In cases involving a government breach of a plea agreement at sentencing, that inquiry must focus on whether the breach affected the sentence that was imposed. Nothing in *Santobello* v. *New York*, 404 U.S. 257 (1971), is to the contrary. *Santobello* arose out of state court proceedings and involved a preserved objection to a government breach of a plea agreement at sentencing, as well as other errors. In ordering relief in that case, the Court did not address whether the federal plain-error standard would apply if the claim instead had been forfeited.

Even assuming that a government breach necessarily affects a defendant's substantial rights in the plea process, the discretionary component of the plain-error standard should preclude reversal if the breach of a sentencing promise did not adversely affect the outcome of the proceedings, *i.e.*, the defendant's sentence. A regime that would permit a defendant to withhold an objection in the district court and then earn reversal on appeal for a non-prejudicial error would cause disrepute for the judicial process and undermine the important interest in the finality of guilty pleas.

III. The government's breach of the plea agreement in this case was not reversible plain error. The government's breach had no effect on the outcome. Before his sentencing, petitioner engaged in new criminal conduct. Criminal conduct is antithetical to acceptance of responsibility, and the district court's remarks at sentencing

made clear that it found that fact controlling. Petitioner therefore cannot carry his burden of demonstrating that the government's failure to support petitioner's request for acceptance-of-responsibility credit affected his substantial rights, *i.e.*, the sentence he received.

Even if one were to accept petitioner's view that substantial rights are always affected when the government breaches a plea agreement, petitioner cannot demonstrate that the government's breach warrants correction under the discretionary component of the plain-error standard. Petitioner's own misconduct rendered the government's promise concerning acceptance-of-responsibility credit valueless to him. Rewarding such a defendant with reversal would produce the very disrepute of judicial proceedings that the plain-error standard is designed to avoid.

ARGUMENT

Because petitioner failed to alert the district court to the government's breach of the plea agreement at sentencing, his claim was subject to the plain-error standard of Federal Rule of Criminal Procedure 52(b). Rule 52(b) "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Under the plain-error standard, petitioner bore the burden of demonstrating that the government's breach affected his substantial rights (*i.e.*, that it was prejudicial), and he did not carry that burden. Even if the breach affected substantial rights, petitioner cannot show that it seriously affected the fairness, integrity, and public reputation of judicial proceedings. To the contrary, rewarding petitioner here with reversal after his own post-plea criminal conduct made the gov-

ernment's agreement that he qualified for acceptance-of-responsibility credit meaningless could call the integrity of judicial proceedings into disrepute. Because the breach was, therefore, not reversible plain error, the judgment should be affirmed.

I. THE PLAIN-ERROR STANDARD OF FEDERAL RULE OF CRIMINAL PROCEDURE 52(b) APPLIES TO FORFEITED PLEA-BREACH CLAIMS

A. Rule 52(b) Applies To All Direct Appeals Of Criminal Cases In The Federal System

1. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); accord *United States* v. *Cotton*, 535 U.S. 625, 631 (2002); *Peretz* v. *United States*, 501 U.S. 923, 936-937 (1991); *United States* v. *Frady*, 456 U.S. 152, 162-163 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). Rule 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in the district court," *Olano*, 507 U.S. at 731. Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed." *Frady*, 456 U.S. at 163.

Rule 52(b) strikes that "careful balanc[e]" by "grant-[ing] the courts of appeals the latitude to correct particularly egregious errors on appeal regardless of a defendant's trial default." *Frady*, 456 U.S. at 163. "The first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error,'" meaning a "[d]eviation from a legal rule" that has not been waived. *Olano*, 507 U.S. at 732-733. "The second limitation on appellate authority under Rule 52(b) is that the error be 'plain,'" meaning "'clear' or, equivalently, 'obvious.'" *Id.* at 734 (citations omitted). "The third and final limitation on appellate authority under Rule 52(b) is that the plain error 'affec[t] substantial rights,'" which "in most cases * * * means that the error must have been prejudicial [in the sense that it] affected the outcome of the district court proceedings." *Ibid.*; accord *Cotton*, 535 U.S. at 632. When all three requirements are satisfied, "the court of appeals has authority to order correction, but is not required to do so." *Olano*, 507 U.S. at 735. The court must "determine whether the forfeited error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' before it may exercise its discretion to correct the error." *Johnson*, 520 U.S. at 469-470 (alteration in original; citation omitted). Under the plain-error standard, "the tables are turned" and "the defendant who sat silent at trial has the burden to show [both] that his 'substantial rights' were affected" and that the court of appeals' discretionary authority to correct the error should be exercised. *United States* v. *Vonn*, 535 U.S. 55, 62-63 (2002) (quoting *Olano*, 507 U.S. at 734-735).

2. Rule 52(b) serves important purposes related to the functioning of federal trial and appellate courts. It codifies a longstanding federal practice "founded upon

considerations of fairness to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). The rule promotes finality and judicial efficiency by requiring claims of error to be raised in the trial court—where they can be examined with the benefit of direct participants and fresh recollections and, if necessary, they can be corrected—in order to receive full consideration on appeal. See *Vonn*, 535 U.S. at 73 ("the value of finality requires defense counsel to be on his toes, not just the judge"); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous objection rule "encourages the result that [trial] proceedings be as free of error as possible"). The rule "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). And the rule diminishes opportunities and incentives for gamesmanship. It discourages a party from silently acquiescing in error in the trial court and then using that error—"pull[ing] the ace out of his sleeve," *United States* v. *Busche*, 915 F.2d 1150, 1151 (7th Cir. 1990)—to gain reversal on appeal should the trial outcome, or the sentence following a guilty plea, be unsatisfactory. *Vonn*, 535 U.S. at 73; *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

B. The Policies Of Rule 52(b) Are Served In The Context Of Forfeited Plea-Breach Claims

Rule 52(b) governs a forfeited claim that the government breached a plea agreement just as it governs any other forfeited claim. As the Court has noted, it has "no authority" to "creat[e] out of whole cloth * * * an ex-

ception" to Rule 52(b). *Johnson*, 520 U.S. at 466. And even if that authority existed, a plea-breach exception to plain-error principles would not be warranted.

1. As this Court has recognized, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice [and,] [p]roperly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971); accord *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Because a guilty plea "is a grave and solemn act," *Brady* v. *United States*, 397 U.S. 742, 748 (1970), and because a defendant who pleads guilty "simultaneously waives several constitutional rights," *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969), the process of pleading guilty in federal court entails numerous protections designed to ensure that a defendant enters a plea knowingly and voluntarily. Federal Rule of Criminal Procedure 11 vests the district court judge presiding over the plea with direct and personal responsibility for assessing the defendant's understanding of the plea proceeding and the conditions under which he is entering the plea. See, *e.g.*, Fed. R. Crim. P. 11(b)(1) (enumerating 14 topics on which the district court judge must advise the defendant personally in open court and determine that the defendant understands). When a plea agreement is involved, the district court's authority includes responsibility for reviewing and accepting (or rejecting) the agreement. See Fed. R. Crim. P. 11(c). The plea agreement must be disclosed (ordinarily) in open court, and the court must inform the defendant of the court's acceptance or rejection of the agreement and the consequences that follow. Fed. R. Crim. P. 11(a)(2) and (c)(3)-(5). The district court also has authority to *en-*

force a plea agreement, through actual or potential use of its authority under Rule 11(d)(2) to permit a defendant to withdraw from a plea of guilty before sentencing upon a showing of "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B).

2. a. The integral role of the district court in the guilty-plea process, and in particular its responsibility to review and approve plea agreements, illustrates why the plain-error standard applies fully in the context of plea-breach claims. Contrary to petitioner's assertion that "normally the [district] court does not know the terms of the plea agreement" (Br. 24), the district court *must* know the terms of the plea agreement in order to perform its role under Rule 11.[6] As a result, "an alleged breach of the plea agreement is precisely the type of claim that a district court is best situated to resolve." *United States* v. *Flores-Payon*, 942 F.2d 556, 560 (9th Cir. 1991). The claim is "fact-specific, * * * not generally one which the passage of time may illuminate," and it may "require an evidentiary hearing or proffer of evidence" to resolve. *Ibid.* The district court has the background knowledge to perform those functions, and judicial economy is served by providing the district court with "the first opportunity to rule." *Ibid.*

b. Providing the district court the first opportunity to address an alleged breach of a plea agreement serves interests of finality and efficiency by, in some cases at least, eliminating the need for appellate review altogether. If the district court finds that a plea agreement has been breached, it has a range of measures to remedy

---

[6] This case is a typical example. The district court had a copy of the filed plea agreement at the plea proceeding, the prosecutor orally summarized the terms of the agreement, and the court reviewed some of the terms in further depth with petitioner and his counsel. J.A. 65a-71a.

the breach or to provide the defendant with alternative relief. For example, if the government agreed in a plea agreement not to file additional charges against a defendant, and then did so, the court can dismiss those charges. Cf. *In re Arnett*, 804 F.2d 1200, 1204 (11th Cir. 1986) (upon finding that the government breached a plea agreement by filing a complaint for forfeiture of the defendant's house and farm, court of appeals permitted the government to cure the breach by withdrawing the forfeiture action). If the government agreed in a plea agreement to request that the defendant be released pending sentencing and then failed to make that request, the court can remind the government of its obligation. Cf. *United States* v. *Pryor*, 957 F.2d 478, 482 (7th Cir. 1992) (observing that alleged government breach of plea agreement, which consisted of the prosecutor's failure to confirm to the court the nature and extent of the defendant's cooperation about which the defendant had testified, "would have been easily cured" if an objection had been made at sentencing). If the government agreed in a plea agreement to relocate the defendant's family out of safety concerns, and then unreasonably delayed in doing so, the court can order the government to fulfill its promise. And if the court decided that the government's breach could *not* be remedied—if, for instance, a family member of the defendant were injured because the government had failed to fulfill a promise to relocate him—the court has the power to permit withdrawal of the defendant's plea under Rule 11(d)(2)(B).

Petitioner contends (Br. 19) that requiring plea-breach claims to be raised in the district court would "do little to further the interest of finality" because "an objection [in the district court] comes too late" to cure a

breach that has already occurred. Petitioner assumes that the only form that a government breach of a plea agreement might take is the narrow form that supports his view, *i.e.*, when the government argues a position at sentencing that is opposite from the position that it agreed to take. Although the breach presented in this case is of that nature, it is not the exclusive form that a breach might take, as the preceding examples illustrate. And the question whether Rule 52(b) applies to plea-breach claims must be assessed with regard to those claims as a category. Cf. *Neder* v. *United States*, 527 U.S. 1, 14 (1999) (whether a constitutional error is "structural" must be assessed as a "categorical" matter rather than through a case-by-case approach).

But even on the facts that petitioner presents—"where the prosecution breaches a promise underlying a guilty plea, and argues *against* a sentence reduction rather than *for* it" (Br. 19)—requiring a contemporaneous objection to the government breach is not so futile as to justify an exception to the plain-error doctrine, even assuming that the Court had authority to carve out an exception. Although petitioner contends that in those circumstances, "the bell cannot be unrung" (*ibid.*), in some cases a retraction by the government of a recommendation that conflicts with its obligation in a plea agreement can remedy the breach. See *United States* v. *Amico*, 416 F.3d 163, 165 (2d Cir. 2005) (government's retraction of its endorsement of sentencing enhancements recommended in PSR cured breach of plea agreement where the government's offending statement was in a "mild, brief, and unassertive form" and the retraction was rapid). "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris* v. *Rivera*, 454 U.S. 339,

346 (1981) (per curiam). There is no reason to reverse that rule in sentencing proceedings and presume judges cannot disregard a prosecutor's recommendation that should not have been made.

The district court also has alternative means of addressing a government breach in its sentencing recommendation that do not require "unringing" a bell. In *Santobello*, the prosecutor recommended that the maximum one-year sentence be imposed, which violated the government's promise in the plea agreement to make no sentence recommendation. 404 U.S. at 259. The Court remanded the case to the state court to remedy the breach, and it identified two remedial options as specific performance of the plea agreement at a resentencing before a different judge or withdrawal of the plea. *Id.* at 262-263. Those remedies are *equally* available to a district court addressing a plea breach objection before an appeal is taken as they are to the court of appeals. In this case, for instance, if petitioner or his counsel had directed the district court to paragraph 8 of the plea agreement and objected that the government's sentencing recommendation violated that provision, the district court could have transferred the matter to a different judge for sentencing or entertained a motion by the defendant to withdraw his plea under Rule 11(d)(2)(B). And an appeal may not have been required at all on the plea-breach issue. As with any other error that can occur in a criminal case resolved through a guilty plea, requiring a contemporaneous objection to an alleged government breach of a plea agreement "concentrates plea litigation in the trial courts, where genuine mistakes can be corrected easily, and promotes the finality required in a system as heavily dependent on guilty pleas as ours." *Vonn*, 535 U.S. at 72.

c. Exempting plea-breach claims from the rigors of the plain-error standard would raise the same concerns about distorted incentives that were present in *Vonn*. In *Vonn*, the Court held that the omission of a plain-error counterpart to the harmless-error rule contained in Rule 11(h) did not mean that forfeited Rule 11 errors were excepted from the plain-error standard of Rule 52(b). 535 U.S. at 58-59. Among other considerations, the Court emphasized that if Rule 52(b) were held not to apply to Rule 11 error, "a defendant could choose to say nothing about a judge's plain lapse under Rule 11." *Id.* at 73. The defendant could "simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders." *Ibid.* The same result would follow from petitioner's proposal that anytime the government breached a plea agreement, a reviewing court must, despite the defendant's forfeiture, automatically reverse in order to permit the defendant to choose "whether to plead guilty under the new conditions and circumstances created by the prosecutor's breach" (Br. 29). Petitioner's rule would create strategic incentives for defendants to withhold objections to government breaches generally, and to *curable* government breaches particularly, because on appeal any breach would guarantee the defendant a second chance to consider whether to plead guilty or not. And that second look would afford the defendant the strategic benefit of perfect hindsight as to the sentence that was imposed the first time around. See *In re Sealed Case*, 356 F.3d 313, 319 (D.C. Cir.) (applying plain-error standard to forfeited plea-breach claims when the defendant had "the opportunity and knowledge to object" in the district court "is totally con-

sistent with the anti-sandbagging philosophy of the Federal Rules"), cert. denied, 543 U.S. 885 (2004).

Relatedly, and as the Court also explained in *Vonn*, freeing forfeited plea-breach claims from the plain-error rule would undercut Rule 11(e), "which governs withdrawing a plea of guilty by creating an incentive to file withdrawal motions before sentencing, not afterward." *Vonn*, 535 U.S. at 72.[7] Rule 11(e) provides that a defendant "may not withdraw a plea of guilty" after sentence is imposed and that, after sentencing, the "plea may be set aside only on direct appeal or collateral attack." Fed. R. Crim. P. 11(e). Rule 11(d), on the other hand, permits a defendant to withdraw a guilty plea before sentencing for "a fair and just reason." Fed. R. Crim. P. 11(d)(2)(B). A rule requiring automatic reversal on direct appeal of forfeited plea-breach claims would collapse the distinction in Rule 11 between pre- and post-sentence plea-withdrawal motions when the basis for the motion is an alleged government breach of the plea agreement. Under petitioner's rule, a defendant could set aside his plea on direct appeal based on a breach as readily as he could through a pre-sentence motion under Rule 11(d)(2)(B). As a result, "the incentive to think and act early * * * would prove less substantial." *Vonn*, 535 U.S. at 73.

---

[7] At the time *Vonn* was decided, the federal rule governing the withdrawal of guilty pleas was Rule 32(e). *Vonn*, 535 U.S. at 72. In 2002, the rule was renumbered as Rule 11(e). See Fed. R. Crim. P. 32 advisory committee's note (2002) (Amendment).

II. PETITIONER'S ARGUMENTS FOR EXEMPTING PLEA-BREACH CLAIMS FROM RULE 52(b) ARE WITHOUT MERIT

Petitioner asserts that a government breach of a plea agreement "changes the conditions under which a guilty plea is entered [and] *compels* reversal of the conviction, as a matter of due process, unless the defendant knowingly and personally accepts the new conditions" (Br. 3). Petitioner further asserts (Br. 17-20) that this rule of automatic reversal applies regardless of whether defense counsel objected to the breach of the plea agreement in the trial court because "[i]f defense counsel cannot expressly waive a defendant's trial rights, counsel certainly cannot forfeit them by silence" (Br. 18). Petitioner also contends that Rule 52(b) "by its terms" (Br. 21) does not apply to plea-breach claims and could do "no substantive work" (Br. 22) if it were applied to plea-breach claims. Those arguments are without merit.

A. A Deviation By The Government From The Terms Of A Plea Agreement Does Not Necessarily Vitiate The Voluntariness Of The Guilty Plea

A central premise of petitioner's argument is that any deviation by the government from the terms of a plea agreement "*necessarily* vitiates the voluntariness of the guilty plea" and thereby "inherently prejudices" the defendant's fundamental rights. Br. 13. That rule would lead to untenable results. For example, suppose that two defendants, *A* and *B*, both pleaded guilty to bank robbery pursuant to plea agreements that included promises by the government that it would ask the district court at sentencing not to require the defendant to pay restitution. And suppose the prosecutor neglected to make that request. The defense attorneys failed to

object, so the government's breach went uncorrected. At sentencing, the district court required *A* to pay restitution but did not require *B* to pay restitution. According to petitioner, the government's breach retroactively rendered both defendants' guilty pleas involuntary and, on appeal, both defendants would be entitled to automatic reversal of their convictions in order to decide whether they will plead guilty "under the new conditions and circumstances created by the prosecutor's breach" (Br. 29). Petitioner's argument has "unqualified simplicity," *Vonn*, 535 U.S. at 63, but it is incorrect.[8]

"A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw* v. *Stumpf*, 545 U.S. 175, 183 (2005) (quoting *Bra-*

---

[8] At two places in his brief, petitioner suggests that a "materiality" standard plays some role in assessing whether a forfeited claim that the government breached a plea agreement requires automatic reversal. See Br. 25 n.6 (referring to breach of a "material" term of the agreement), 30 (observing that plain-error standard is "necessarily satisfied for any material breach of a plea agreement's terms"). To the extent that petitioner concedes that some government breaches of plea agreements will not require a guilty plea to be set aside, that concession contradicts petitioner's principal assertion that an alteration in "the conditions under which the defendant elected to waive his trial rights * * * render[s] the waiver involuntary by definition." Br. 9; Cf., *e.g.*, *United States* v. *Brody*, 808 F.2d 944, 948 (2d Cir. 1986) (a government breach of a plea agreement does not automatically require resentencing; whether a remedy is required will depend on the nature of the broken promise and the facts of the case). Petitioner's apparent concession that some government breaches are not "material" enough to warrant relief also amounts to acknowledgment that harmless-error principles, and by extension plain-error principles, *can* be applied to plea-breach claims. If those principles *can* be applied, Rule 52 dictates that they *must* be applied.

dy, 397 U.S. at 748). "[O]nly when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause." *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984). That due process standard provides the framework for understanding this Court's statement that the "voluntariness" of a guilty plea is assessed in part by whether "unfulfilled or unfulfillable promises" induced the plea. *Brady*, 397 U.S. at 755; see *Santobello*, 404 U.S. at 261 (if a promise is part of the inducement or consideration of a guilty plea, it must be fulfilled). While the government, just like the defendant, should of course fulfill all its promises in a plea agreement, not every government deviation from the terms of a plea agreement will mean that the defendant was not fairly apprised of the consequences of his plea such that the plea should be retroactively deemed to be involuntary. In the predominant factual setting in which claims of a plea breach by the government arise—alleged breaches of government promises to take a particular position at sentencing—the circumstances may compel the conclusion that, notwithstanding a government breach, the defendant received the benefit for which he bargained and, accordingly, the defendant must be said to have been "fairly apprised" of the consequences of his plea.

In the case of defendants *A* and *B* described above, for instance, the "consequence" that the government's promise secured was a *chance* that the sentencing court would be influenced by and follow the government's recommendation that restitution not be required. The actual value to the defendants of that promise cannot be known at the time the plea agreement is entered, because its calculation requires a prediction about whether the sentencing court will be influenced by the govern-

ment's recommendation or not.[9] Defendant *A* was deprived of the benefit for which he bargained, because he did not receive the enhanced *chance* at avoiding restitution that was part of his deal. If his objection were properly preserved, he would be entitled to a remedy. See *Santobello*, 404 U.S. at 262-263.

In the case of defendant *B*, however, the defendant was not deprived of the benefit for which he bargained, and the government's breach therefore cannot be said to have rendered the guilty plea "involuntary" in any way that warrants relieving him from the plea. Defendant *B* bargained for an enhanced *chance* for leniency with respect to restitution—and, by virtue of the district court's sentence, he received even more, *i.e.*, *actual* leniency. In those circumstances, due process requires no remedy for the prosecutor's breach. See, *e.g.*, *United States* v. *Vaval*, 404 F.3d 144, 154 (2d Cir. 2005) ("[N]ot every breach requires a remedy; the need for a remedy depends upon the 'nature of the broken promise and the facts of each particular case.'") (quoting *United States* v. *Brody*, 808 F.2d 944, 948 (2d Cir. 1986)); *Paradiso* v. *United States*, 689 F.2d 28, 30-31 (2d Cir. 1982) (where plea agreement bound court to impose concurrent sentences and court initially imposed consecutive sentences, but where court then modified sentences upon defendant's motion under Rule 35, "the technical divergence from the precise terms of the plea agreement" did not require a remedy and "did not render appellant's plea involuntary by frustrating his reasonable expectations

---

[9] One exception is a plea agreement entered pursuant to Rule 11(c)(1)(C) which, if accepted by the court, binds the court to abide by the sentencing terms made part of the agreement. See Fed. R. Crim. P. 11(c)(1)(C) and (4).

with regard to sentence"), cert. denied, 459 U.S. 1116 (1983).

Petitioner's theory that a government breach "*necessarily* vitiates the voluntariness of the guilty plea" and requires that his plea be set aside (Br. 13) also assumes that the value to the defendant of a government promise cannot change after the plea is entered. On the facts of this case, for instance, petitioner asserts that the voluntariness of his guilty plea was vitiated by the government's breach because, "if the Government had not promised to seek a three-level reduction, he never would have entered the plea agreement." Br. 26. The government's promise regarding acceptance-of-responsibility credit may have been important to petitioner at the time he entered his guilty plea. But the extent to which the government's breach actually harmed petitioner's reasonable expectations about the benefits he would receive under the plea agreement must be assessed no earlier than when the *breach* occurred. It cannot realistically be assessed as of the time the plea was entered.

To illustrate, suppose that after his guilty plea, petitioner had obstructed justice by offering the Guaranty Bank tellers cash if they would recant their identifications of him, a turn of events that might have supported a motion to withdraw petitioner's guilty plea. If the scheme were discovered, petitioner might have become subject to application note 4 of the acceptance-of-responsibility Sentencing Guideline, which provides that obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." Sentencing Guidelines § 3E1.1, comment. (n.4). That note also provides that only in an "extraordinary case" should acceptance-of-responsibility credit be awarded to a defendant who has obstructed justice.

Ibid. Judged at the time of the plea, the government's promise to support petitioner's request for acceptance-of-responsibility credit may have had significant value to him. But at the time of sentencing, when acceptance-of-responsibility credit was all but foreclosed by the Sentencing Guidelines, that promise would have lost most, if not all, of its value. Assessing the harm caused by a government breach of a plea agreement by reference to the value of the government's promise at the time a guilty plea was entered is equivalent to assessing the current value of a company's stock by reference to last year's trading price.

B. The Contemporaneous Objection Requirement Applies Equally When A Waiver Of Trial Rights Is At Issue

A second premise of petitioner's argument (Br. 17-20) is that applying the plain-error standard to forfeited plea-breach claims is equivalent to permitting counsel to waive a defendant's right to trial. Petitioner contends that "if defense counsel cannot expressly waive a defendant's trial rights, counsel certainly cannot forfeit them by silence." Br. 18. There is a difference, however, between permitting counsel to "expressly waive" a defendant's trial rights and requiring counsel to object to errors in proceedings in which the *defendant* "expressly waives" his trial rights, or in subsequent proceedings that relate back to that waiver. The Court's precedents make clear that Rule 52(b)'s strictures for reviewing forfeited claims apply with full force to a claim that a defendant's waiver of a constitutional or statutory right was invalid.

In *Johnson*, this Court rejected the argument that the plain-error rule was inapplicable because the error asserted was "structural." 520 U.S. at 466. The Court

explained that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Ibid.* The Court subsequently held that Rule 52(b) applies even when the nature of the claimed error is that the defendant did not make an informed waiver of his trial rights. In *Vonn*, the Court reviewed for plain error under Rule 52(b) a claim that a defendant did not adequately waive his rights in pleading guilty because the trial court failed to advise him of his right to counsel at trial as required by Rule 11. The Court explained that "counsel is obligated to understand the Rule 11 requirements" and that "[i]t is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court." *Vonn*, 535 U.S. at 73 n.10; accord *Dominguez-Benitez*, 542 U.S. at 82 (applying plain-error standard to forfeited claim of Rule 11 error and holding that defendant bears burden under that standard of showing, among other things, a reasonable probability that, but for the error, he would not have entered the plea).

Petitioner's reliance (Br. 17-18) on *Henderson* v. *Morgan*, 426 U.S. 637 (1976), is misplaced. *Henderson* involved a collateral attack on a guilty plea on the ground that the defendant was not informed of, and did not understand, an essential element of the offense to which he had pleaded guilty, second-degree murder. *Id.* at 638-639. The defendant had not filed a direct appeal following his guilty plea. *Id.* at 638. Without addressing whether procedural-default principles should apply, the Court upheld the lower courts' holdings that the defendant's plea "was involuntary and had to be set aside," *id.* at 640, because the record failed to show that the defen-

dant understood, and admitted to having, the requisite intent, *id.* at 646.

Petitioner contends that *Henderson* demonstrates that a lack of objection in the trial court to an allegedly involuntary plea does "not diminish the violation or restrict the standard of review." Br. 17. But *Henderson* is silent on the standard of review. And subsequently in *Bousley* v. *United States*, 523 U.S. 614 (1998), the Court made clear that procedural-default principles apply with equal force to claims that involve allegedly involuntary guilty pleas: "[E]ven the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Id.* at 621. The defendant in *Bousley* claimed in a collateral attack that his guilty plea was not knowing and intelligent because he had been misinformed about the elements of the offense to which he pleaded guilty. *Id.* at 617-618. As in *Henderson*, the defendant in *Bousley* had not challenged the validity of his plea on direct appeal. *Id.* at 617. The Court held in *Bousley* that the defendant's claim could be considered on the merits only if he overcame "significant procedural hurdles," *id.* at 621, namely, he was required to demonstrate cause for and actual prejudice from his procedural default, or actual innocence, *id.* at 622 (citing, *e.g.*, *Murray* v. *Carrier*, 477 U.S. 478 (1986)).

C. There Is No Functional Impediment To Applying The Plain-Error Standard To Plea-Breach Claims

Petitioner asserts that Rule 52(b) "cannot be meaningfully applied to review of a prosecutor's breach of a plea agreement." Br. 24. Relying on *Nguyen* v. *United States*, 539 U.S. 69 (2003), petitioner contends that plea-breach claims therefore are in a category of errors that are "not susceptible to plain-error review under Rule

52(b)." Br. 21. That is incorrect. In this context, as in most settings, the claimed error can be examined to determine whether it had an effect on "substantial rights" and, absent such a showing, reversal is not warranted.

1. *Nguyen* bears no resemblance to this case. *Nguyen* involved the composition of a panel of the United States Court of Appeals for the Ninth Circuit. 539 U.S. at 71. In violation of the federal statute permitting "one or more district judges within the circuit" to sit on the court of appeals, see 28 U.S.C. 292(a), the Ninth Circuit panel included a judge from the District Court for the Northern Mariana Islands, a non-Article III court, who did not qualify as a "district judge" within the meaning of 28 U.S.C. 292(a). *Nguyen*, 539 U.S. at 74-75. Although no objection to the composition of the panel was raised in the Ninth Circuit, the Court concluded that the judgment was required to be vacated without regard to plain-error principles. *Id.* at 80-81. The Court justified that departure from ordinary principles of appellate review by emphasizing the unique nature of the error at issue and its connection to policies of judicial administration over which the Court has supervisory power: "Because the error in these cases involves a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business,' * * * our exercise of supervisory power is not inconsistent with th[e] general rule" that federal courts must "assess trial errors for their prejudicial effect." *Id.* at 81 (citation omitted). Unlike *Nguyen*, this case does not involve policies concerning "the proper administration of judicial business." It involves trial error. The "general rule," reaffirmed in *Nguyen*, therefore applies: "[F]ederal courts may not use their supervisory powers to circumvent the obliga-

tion to assess trial errors for their prejudicial effect." *Ibid.* (citing *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988)).

2. Petitioner's arguments for why Rule 52(b) "cannot meaningfully be applied" to plea-breach claims (Br. 24) also lack merit. Petitioner contends that a breach of the plea agreement "can never be 'plain' to the court" (*ibid.*) because the district court "normally" would not know the terms of the agreement. But as discussed (see pp. 19-20, *supra*), and as illustrated by the facts of this case, petitioner is wrong. District courts *do* know the terms of plea agreements because they must review and approve those agreements. And in any event, the defense attorney and the defendant surely know the terms of the agreement because they are signatories to it. There is no more reason to excuse a failure to object to obvious error in this context than in any other.

Petitioner also contends (Br. 25-28) that "substantial rights" will always be affected when a plea agreement has been breached. That too is incorrect. This Court has instructed that an effect on substantial rights under the plain-error rule ordinarily means that the error "must have been prejudicial," which in turn means that it "must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. An error will be found to have had no effect on a defendant's substantial rights, therefore, if the outcome of the proceeding "would have been the same" if the error had not occurred. *Jones* v. *United States*, 527 U.S. 373, 402 (1999); *Neder*, 527 U.S. at 17.

Where, as in this case, the government breach involves a prosecutor's failure to make or abstain from particular comments at sentencing, a defendant will carry his burden of showing an effect on substantial

rights only if he can demonstrate that the prosecutor's breach detrimentally affected the sentence that was imposed. The benefit a defendant receives from the prosecutor's agreement is the potential influence that the prosecutor will have *on the defendant's sentence*. The question whether the prosecutor's breach of the agreement prejudiced the defendant must focus on the proceeding that was affected by the error—in this case, sentencing. See, *e.g.*, *United States* v. *Flores-Sandoval*, 94 F.3d 346, 351-352 (7th Cir. 1996) (government's failure to advise sentencing court of its recommendation that the court impose sentence at the low end of the Guidelines range did not affect substantial rights where court's comments revealed that it was aware of the government's recommendation, which was contained in the plea agreement); *United States* v. *D'Iguillont*, 979 F.2d 612, 613-614 (7th Cir. 1992) (government argument in favor of upward departure did not affect substantial rights where court sentenced defendant within the Guidelines range), cert. denied, 507 U.S. 1040 (1993).

This approach is consistent with *Hill* v. *Lockhart*, 474 U.S. 52 (1985), and *Dominguez-Benitez*, *supra*, on which petitioner relies (Br. 27-28). In *Hill*, the Court held that a defendant who claims that his lawyer provided ineffective assistance in the advice he provided in connection with a guilty plea satisfies the "prejudice" requirement of *Strickland* v. *Washington*, 466 U.S. 668 (1984), by showing that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 58-59. In *Dominguez-Benitez*, the Court held that a defendant who raises a forfeited Rule 11 error on direct appeal satisfies the "effect on substantial rights" component of the plain-error standard by

showing "a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. In both of those cases, the error related to the process through which the guilty plea itself was entered. In assessing prejudice in that context, it is appropriate to focus on the proceeding affected by the error—the plea proceeding—and examine whether error in the process led the defendant to enter a guilty plea that he otherwise would have foregone. By contrast, when the error complained of relates to the *execution* of a plea agreement, the assessment of prejudice must focus on whether the outcome of the proceeding in which the breach occurred was affected by the error. When the breach occurs at sentencing, the "effect on substantial rights" inquiry therefore examines the sentencing itself. See *United States* v. *Jensen*, 423 F.3d 851, 854 (8th Cir. 2005) (government breach of agreement to make motion that defendant receive third level of credit for acceptance of responsibility was not reversible plain error where defendant did not demonstrate a reasonable probability that district court would have imposed a lesser sentence if the government had moved for the additional level); cf. *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (sentencing error is not prejudicial if "the error did not affect the district court's selection of the sentence").

3. *Santobello* is not to the contrary. In that case, which arose out of state court, the prosecutor recommended to the sentencing court that the defendant receive a one-year sentence and supported the recommendation with remarks concerning the defendant's criminal history and links with organized crime. 404 U.S. at 259. A different prosecutor had agreed to make no recommendation on sentence. *Id.* at 258. The defense attor-

ney, who was new to the case at sentencing, objected to the breach and offered to prove up the terms of the agreement. *Id.* at 259. The prosecutor resisted, asserting that the record did not reveal any promise concerning sentencing. *Ibid.* The judge, who also was new to the case at sentencing, "ended discussion," *ibid.*, indicated he was "not at all influenced" by the prosecutor's remarks, and imposed a one-year sentence, *id.* at 259-260. This Court reversed without reaching the question "whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea." *Id.* at 262. The Court concluded "that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration" concerning the remedy to which the defendant was entitled. *Id.* at 262-263.

Santobello involved a situation in which, on top of the obvious government breach of the plea agreement that occurred, the government opposed the defense's request to present proof of the plea agreement, the sentencing court disavowed interest in knowing anything about the terms of the plea agreement, and the sentencing court imposed the precise sentence that the prosecutor improperly requested. The fact that the Court declined to consider whether the multiple errors in *Santobello* were harmless says nothing about whether and how the plain-error standard should be applied in federal cases, subject to Rule 52(b), where (as here) the terms of the plea agreement are known to the courtroom participants, and where no one alerts the district court to an obvious breach as it occurs. See *Amico*, 416 F.3d at 168 n.3 (*Santobello* "did not state a *per se* rule requiring re-

sentencing in any case of prosecutorial breach of a plea agreement regardless of the extent of breach and absence of prejudice); *In re Sealed Case*, 356 F.3d at 316 (*Santobello* "[i]n no way" dictates the standard of review in a case of forfeited error). The Court's statement in *Santobello* that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled," *Santobello*, 404 U.S. at 262, reflects a legal norm in this area but is not inconsistent with the conclusion, compelled by the Court's decisions under Rule 52(b), that when a defendant fails to object to a government breach in the district court, he will face a more formidable burden to demonstrate his entitlement to relief on appeal. That burden must include a showing that the government's breach had an effect on substantial rights, *i.e.*, it caused actual prejudice to the defendant in the outcome of the proceeding.

D. A Plea-Breach Claim Raised For The First Time On Appeal May Be Barred By The Discretionary Component Of Plain-Error Review

Relying on *Santobello*, petitioner contends that the fourth requirement of plain-error review is "easily satisfied by the prosecution's breach of any plea agreement," Br. 29, because a government breach "undermines 'public confidence in the fair administration of justice,'" Br. 28. See NACDL Amic. Br. 21-22. Even on the assumption that a plain government breach of a plea agreement necessarily affects a defendant's substantial rights by altering the terms on which he waived his trial rights, the discretionary component of the plain-error rule should preclude reversal if that breach did not adversely

affect the defendant's sentence. As the Court observed in *Johnson*, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." 520 U.S. at 470 (quoting Roger Traynor, *The Riddle of Harmless Error* 50 (1970)). A rule that would allow a defendant to refrain from raising an obvious government breach of a plea agreement in the district court, and then, after sentence and entry of judgment, use that breach to escape his plea even if the breach did not affect the sentence the defendant received, would convert guilty plea proceedings into a strategic battle to have one's cake and eat it too. That regime would elevate inconsequential errors over substantial justice.

Particularly in the guilty plea process, where this Court has declined to "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess," *United States* v. *Hyde*, 520 U.S. 670, 677 (1997), reviewing courts should be wary of allowing defendants to seize on any forfeited errors to overturn their convictions. A defendant's failure to object to a government breach may be evidence that the participants at the time did not regard it as particularly consequential. A reviewing court can certainly take that reality into account before upsetting an otherwise-final conviction. Reversal in this context allows a defendant the option, often years after the fact, of putting the government to its proof and reopening the matter for victims and witnesses. Where the defendant cannot show that the government's fulfillment of its promises likely would have changed the outcome, allowing the plea-based conviction to stand *protects* the integrity and public reputation of the proceedings.

III. THE GOVERNMENT'S BREACH OF THE PLEA AGREEMENT IN THIS CASE WAS NOT REVERSIBLE PLAIN ERROR

The government has conceded that, by opposing a downward adjustment in petitioner's offense level for acceptance of responsibility, it breached the agreement it made with petitioner that he had demonstrated acceptance of responsibility. Unlike the government's motion in support of a third level of acceptance-of-responsibility credit, the plea agreement contained no provision that explicitly permitted the government to withdraw its commitment if petitioner engaged in subsequent criminal conduct that undermined his showing of acceptance. See Sentencing Guidelines § 3E1.1, comment. (n.1(b)). The agreement also contained no explicit provision that required petitioner to abstain from criminal conduct. Under the explicit terms of the agreement (and the government has not asserted in these proceedings that the agreement contained additional implicit terms), the government's breach was obvious. But the court of appeals correctly determined that petitioner is not entitled to relief because he cannot establish that the government's breach was reversible plain error. Petitioner cannot show that his substantial rights were affected by the government's breach. See *Olano*, 507 U.S. at 734. Nor can petitioner show that discretionary correction of the forfeited error is warranted because the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160).

A. Petitioner Cannot Demonstrate That The Government's Breach Of The Plea Agreement Affected His Substantial Rights

As the court of appeals determined, the record demonstrates that petitioner's substantial rights were not affected by the government's breach because the district court made clear that, in the circumstances that existed at the time of sentencing—which included the defendant's admission that he had engaged in new criminal conduct while he was awaiting sentencing—the court would not award petitioner credit for acceptance of responsibility. See J.A. 80a-81a, 111a. The only value to petitioner of the government's agreement that he qualified for acceptance-of-responsibility credit was the influence that the government's view *might* have had on the district court. Through his own intervening criminal conduct, however, petitioner put acceptance-of-responsibility credit outside his own reach and, in doing so, fundamentally devalued the government's promise to the point that, at the time of sentencing, it had no value. As the court of appeals concluded, even if the government had maintained its position that petitioner qualified for an acceptance-of-responsibility adjustment, there is no likelihood that the government would have influenced the district court's sentencing decision given petitioner's intervening criminal conduct. Pet. App. 1, at 5. Petitioner therefore cannot carry his burden of demonstrating that his substantial rights were affected by the government's breach.

B. Petitioner Cannot Demonstrate That The Government's Breach Of The Plea Agreement Seriously Affected The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings

Even if one were to accept petitioner's view that substantial rights are always affected when the government breaches a plea agreement, petitioner cannot demonstrate that the government's breach warrants correction by the court of appeals because the breach did not, in the context of this case, "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *Atkinson*, 297 U.S. at 160). It was undisputed in the district court that petitioner committed a new crime before he was sentenced. Continued criminal conduct is the antithesis of acceptance of responsibility. Although the government failed to fulfill the unconditional promise it made (before petitioner's renewed criminal conduct) to support petitioner's request for an acceptance-of-responsibility adjustment, the reciprocal assurance on which the government's promise implicitly was based was that petitioner would not return to criminality before he was sentenced. Petitioner's own conduct ensured that, regardless of what the government said, no reasonable probability existed that the court would be influenced.

The discretionary component of the plain-error rule should preclude reversal if a defendant engages in post-plea misconduct that renders the government's sentencing promise an absurdity. In that situation, there is no basis to conclude that a "miscarriage of justice" or any other impairment of the integrity of judicial proceedings would result, *Olano*, 507 U.S. at 736 (quoting *Young*, 470 U.S. at 15), if the defendant were not allowed to withdraw his guilty plea. Cf. *Cotton*, 535 U.S. at 633 (omis-

sion of drug quantity from indictment did not seriously affect fairness, integrity, or public reputation of judicial proceedings where evidence supporting drug quantity was overwhelming and essentially uncontroverted); *United States* v. *Branam*, 231 F.3d 931, 933 (5th Cir. 2000) (assuming prosecutor's comment at sentencing breached plea agreement and satisfied first three requirements of plain-error standard, relief was not warranted under fourth requirement of plain-error review because defendant failed to comply with plea agreement's reasonable and specific procedures for determining whether a breach had occurred and for affording the breaching party a reasonable opportunity to explain or cure the breach). Indeed, just the opposite is true when it comes to protecting the integrity of judicial proceedings. Rewarding a defendant with reversal after the defendant not only made the government's commitment meaningless through his own criminal conduct, but also stood by silently at sentencing, would instead produce the very disrepute of judicial proceedings that the plain-error rule is designed to avoid.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LISA H. SCHERTLER
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

DECEMBER 2008

APPENDIX

1. Federal Rule of Criminal Procedure 11 provides:

Pleas

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) **Disclosing a Plea Agreement.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) **Judicial Consideration of a Plea Agreement.**

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no

right to withdraw the plea if the court does not follow the recommendation or request.

(4) **Accepting a Plea Agreement.** If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) **Rejecting a Plea Agreement.** If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

2. Federal Rule of Criminal Procedure 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.